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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1900.

No. 143.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

vs.

L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED,
DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED OCTOBER 10, 1899.

(17,533.)

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along said road about 10 chains to a fence; thence southwe

TRANSCRIPT ON APPEAL.

In the Supreme Court of the State of California.

Appeal from the Superior Court of the County of Marin, State of California.

[Title of Court and Cause.]

COMPLAINT.

Ebenezer Wormouth, plaintiff, complains of Peter Gardner and Jacob Gardner, defendants, and for cause of action avers:

I. That on the 1st day of February, A. D. 1891, the plaintiff was, and for a long time prior thereto had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit: Beginning at a post marked "C M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of section 28, and lot 3 of section 29, township 1 north of range No. 6 west, M. D. M., containing 46 acres and 26 hundredths. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

II. That on, to wit, the said 1st day of February, A. D. 1891, and while this plaintiff was so possessed and entitled to the possession of said land and premises, the said de-

2 fendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except that portion thereof bounded and described as follows, to wit: Beginning at a post marked "C .M. P. 180"; running thence due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwest-

erly along said fence to the said creek; thence descending the said creek to the point of beginning), and ever since have wrongfully and unlawfully withheld and still withhold the possession thereof from this plaintiff, to his damage in the sum of five hundred dollars ($500.00).

III. That the reasonable monthly value of the rents and profits of said land and premises is about Fifty Dollars per month, and that by reason of the unlawful withholding of said land and premises by defendants as aforesaid, plaintiff has been deprived, and by the continuance thereof will be deprived of the use and occupation of the same to his loss and damage in the sum of Fifty Dollars per month.

Second.

And for another, further and separate cause of action, and for the purposes of equitable relief, plaintiff avers and shows:

IV. That on the 1st day of February, A. D. 1891, the plaintiff was, and for a long time prior thereto had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to possession of that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit: Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of section 28, and lot 3 of section 29, township No. 1 north of range No. 6, M. D. M., containing 46 acres and 26 hundredths. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

3

That on, to wit, the said 1st day of February, A. D. 1891, and while this plaintiff was so possessed and entitled to the possession of said land and premises, the said defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except that portion thereof bounded and described as follows, to wit: Beginning at the post marked "C. M. P. 180"; thence running due north 2.45 chains to post marked "C. M. P. 181"; thence north 9 degrees east to a road known

as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwesterly along said fence to the said creek; thence descending said creek to the point of beginning), and ever since have wrongfully and unlawfully withheld, and still withhold the possession thereof from this plaintiff, to his damage in the sum of five hundred dollars, ($500.)

That the value of the rents and profits of the said land and premises while this plaintiff has been so excluded therefrom is the sum of fifteen hundred dollars, ($1500.)

During the time that defendants have excluded the plaintiff from said land and premises the said defendants have assumed the right to lease, and have let various parties into the possession of portions of said land and have been exacting from and receiving from such parties large sums of money claimed by said defendants as rental of the portions of land severally occupied by them, such sums amounting in all, as plaintiff is informed and believes, to at least fourteen hundred and fifty dollars, which should have been paid to the plaintiff; and that said defendants are continuing to collect from various parties now in such occupancy large sums of money claimed by said defendants under such unlawful pre-
4 tense, and threaten to continue to do so; that said parties are numerous, are unknown to the plaintiff, and are frequently changing; that said defendant Peter Gardner is insolvent; that said defendants are conspiring together to defraud this plaintiff out of the rents and profits of said land, and to that end are endeavoring to mislead this plaintiff as to which of said defendants is receiving said sums of money, and plaintiff does not know and cannot ascertain the facts in relation thereto, so that it is impossible for this plaintiff to obtain adequate relief in an action at law; that defendants have cut and carried away a large quantity of valuable timber growing upon said land, and threaten to and will, unless restrained by this Honorable Court, continue to cut and carry away valuable timber therefrom; that there is upon said land so unlawfully occupied by the defendants a building of great value, the property of this plaintiff, which said building this plaintiff believes and therefore charges that the said defendants design and intend to either destroy or remove from said land, to the great damage of plaintiff.

And plaintiff avers that the acts hereinbefore complained of are continuous and that their continuance during the litigation of this action, and the cutting and carrying away timber

from said land, and the destruction or removal of said or any building from said land, or either the continuance of said acts or said cutting of timber or said destruction or removal, would produce great injury to the plaintiff, for which he is remediless at law.

Wherefore plaintiff prays judgment for the restitution of said land and premises, for the sum of five hundred dollars damages for the withholding thereof, and for damages estimated at the rate of Fifty Dollars per month, the value of the rents and profits of said land and premises, from the 1st day of February, 1891, until the day of the Judgment to be entered herein, together with costs of suit; that until the further order of this Court the said defendants and each of them, their and each of their servants, agents, attorneys, employees and all persons acting under the control, authority or direction of them, or either of them, or claiming or to claim by, through or under them, or either of them, be enjoined and commanded to absolutely refrain from and desist from leasing to or letting any person or person into possession of any portion of said land and premises, and from receiving from any person or persons any sum of money whatever in consideration of the occupancy of any portion of said land and premises; and from cutting or interfering with any timber growing upon said land; and from destroying or removing from said land any building or structure whatever, and from interfering in any manner with said land and premises, or any portion thereof; and for such other or further relief as may be just and equitable.

TAYLOR & CRAIG,
Attorneys for Plaintiff.

[Duly verified.] [Duly filed.]

ANSWER.

I.

Now come the defendants, Peter Gardner and Jacob Gardner, and for answer to the first count of the Complaint on file in the above entitled action.

1st. Deny that on the 1st day of February, 1891, or any other time, the plaintiff was or for a long time or any time prior thereto, had been the owner of, or in the possession of, or entitled to the possession of, or from thence hitherto, or from any period of time or ever, has been the owner of or entitled

to the possession of the land described in said Complaint or any part thereof, or any of the tenements, hereditaments, or appurtenances thereunto belonging, or in anywise appertaining, except that plaintiff was on said day, and since that time has been in the possession of so much of the said land described in said Complaint, as is described as follows:

"A." Beginning at a post marked "C. M. P. 180," running thence due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the
6 said creek, thence descending the said creek to the point of beginning.

"B." Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of the said Blythedale road, running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from said line of said rancho, thence along said fence north 8 degrees 10 minutes west 514 5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle south 8 degrees 30 minutes west 277 5-10 feet, south 16 degrees 55 minutes west 143 7-10 feet, south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.

2nd. And defendants deny that on the 1st day of February, 1891, or while the plaintiff was possessed or entitled to the possession of said land or premises or any part thereof, except the said portion hereinbefore described, the defendants without right or title, or wrongfully, or unlawfully, or otherwise, or at all, entered into or upon the said land, or ousted or ejected the plaintiff from the same, or any part thereof, or that they ever entered at all into or upon any part of said excepted parcels of said land, or that said defendants, or either of them, have ever since wrongfully, or unlawfully, withheld the possession of any of said land from the plaintiff, or that the defendants ever ousted or ejected the plaintiff from any part of said excepted parcels of said land, or that defendants or either of them, have ever wrongfully or unlawfully, or otherwise or at all, withheld, or still, or now withhold the possession or any part of said excepted parcels of land hereinbefore described, from the plaintiff, or that the plaintiff has ever

been damaged by any withholding by defendants of said land from him in the sum of $500.00 or any other sum of money, but, on the contrary, these defendants aver that the defendant, Jacob Gardner, and his predecessors in estate, were at the date of the commencement of this action, and for more than
7 forty years next prior thereto, had been and still are the owners of and in the open, actual, and adverse possession of all of the lands described in said Complaint, except so much thereof as is hereinbefore described, and that the defendant, Peter Gardner, has for more than two years last been upon the said premises under and in subordination to the said Jacob Gardner and his title.

3rd. Deny that the reasonable monthly value or any monthly value of the rents and profits of the lands and premises or the lands or premises described in the Complaint is or ever was about $50.00 per month or any value per month greater than $10.09 per month, or that by reason of the unlawful withholding or any withholding of said land and premises, or said land or premises, by defendants, or either of them, plaintiff has been deprived or by the continuance thereof will be deprived of the use and occupation of the same to his loss and damage in the sum of $50.00-100 per month or any sum of money greater than $10.00-100 per month.

II.

And defendants, for answer to the second count of said complaint.

1st. Deny that on the 1st day of February, 1891, or at any other time prior thereto, had been the owner of or in the possesion of, or entitled to the possession of, or from thence hitherto, or from any period of time, or ever, has been the owner of, or entitled to the possession of the land described in said Complaint, or any part thereof, or any of the tenements, hereditaments or appurtenances thereunto belonging, or in anywise appertaining, except that plaintiff was on said day, and since that time has been in the possession of so much of the said land described in said Complaint as is described as follows:

"A." Beginning at the post marked "C. M. P. 180," thence running due north 2.45 chains to post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the

said creek, thence descending said creek to the point of beginning.

"B." Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio, with the northerly line of said Blythedale road, running thence N. 9 deg. E. along said line of said Rancho to a fence which runs N. 8 deg. 10 min. W. from the said line of said Rancho, thence along said fence N. 8 deg. 10 min. W. 514 5-10 feet, N. 14 deg. 30 min. W. 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle S. 8 deg. 30 min. W. 277 5-10 feet, S. 16 deg. 55 min. W. 143 7-10 feet, S. 22 deg. 11 min. W. to the said northerly line of said Blythedale road; thence southeasterly along the said northerly line of said road to the place of beginning.

2nd. And defendants deny that on the 1st day of February, 1891, or while the plaintiff was possessed or entitled to the possession of said land or premises or any part thereof, except the said portions hereof hereinbefore described, the defendants without right, or title, wrongfully, or unlawfully, or otherwise or at all entered into or upon the said land, or ousted or ejected the plaintiff from the same, or any part thereof, or that they ever entered at all into or upon any part of said excepted parcels of said land or that said defendant or either of them, have ever since wrongfully or unlawfully withheld possession of any of said land from the plaintiff, or that the defendants ever ousted or ejected the plaintiff from any part of said excepted parcels of said land, or that defendants or either of them have ever, wrongfully, or unlawfully, or otherwise or at all, withheld or still or now withhold the possession of any part of said excepted parcels of land hereinbefore described from the plaintiff or that the plaintiff has ever been damaged by any withholding by defendants of said land from him, in the sum of $500.00 or any other sum of money, but on the contrary these defendants aver that the defendant, Jacob Gardner, and his predecessors in estate, were at the date of the commencement of this action, and for more than forty years next prior thereto, had been and still are
9 the owners of and in the open, actual and adverse possession of all of the lands described in said Complaint, except so much thereof as is hereinbefore described, and that the defendant, Peter Gardner, has for more than two years last past been upon said premises under and in subordination to the said Jacob Gardner and his title.

3rd. And defendants deny that the value of the rents and profits of said land and premises described in said Complaint, during the time it is alleged that the plaintiff has been excluded therefrom, is the sum of $1500.00 or any other sum greater than $100.00.

4th. Defendants deny that the sums received by them or either of them, as rents of the said land during the period during which it is alleged in said Complaint that the plaintiff was excluded therefrom by defendants, amount to the sum of $1450.00 or any greater sum than $550.00.

5th. And defendants deny that they are continuing to collect from various or any parties now in the occupancy of said land, large sums of money, or any sums of money claimed by defendants under any unlawful pretense, and they aver that the sums of money being collected by them are small sums which they have a right to collect and are rightfully collecting. And deny that the parties from whom defendants are collecting such moneys are numerous or unknown to the plaintiff.

6th. And defendants deny that they or either of them are conspiring together to defraud the plaintiff out of the rents or profits of said land, or to that end or otherwise or at all, are endeavoring to mislead the plaintiff as to which of said defendants is receiving said sums of money, or that plaintiff does not know or cannot ascertain the facts in relation thereto, or that it is impossible for plaintiff to obtain adequate relief in an action at law, and deny that defendants or either of them have cut or carried away a large quantity or any quantity of valuable timber, or any kind of timber growing upon said land described in said Complaint, or which ever grew thereon, or that they threaten to, or will unless restrained by this Court, continue to cut or carry away valuable timber or any timber therefrom, or that there is upon said land occupied by the defendants a building of great value, or any building which is the property of the plaintiff, and deny that the defendants design or intend, or ever designed or intended to destroy or remove from the land mentioned and described in said Complaint, the building mentioned in said Complaint.

7th. And defendants deny that the acts or any act complained of in the second count of plaintiff's Complaint are continuous, or that they were ever committed at all, and deny that the continuance of any act or acts complained of in said Complaint during the litigation of this action, or the cutting or carrying away of any timber from said land, or the destruc-

tion or removal of said or any building from said land, or either the continuance of said acts, or said cutting of timber, or said destruction or removal would produce great or any injury to the plaintiff, or for which he is remediless at law, and defendants most emphatically deny that they intend to cut or carry away any timber from said land, or to destroy or remove from said land any building thereon.

8th. And for a further and separate defense to both of the causes of action for damages alleged in plaintiff's Complaint:

The defendants allege that during the period during which said defendants have been in possession of the land described in said Complaint, except the said excepted portions of said land hereinbefore described, the defendants made and erected on the said lands outside of said excepted portions, permanent improvements, consisting of a house and fencing of the value of $2000.00, and that said defendants were at the time of the erection of said improvements, holding said lands under color of title adversely to the claim of the plaintiff in good faith.

Wherefore defendants pray Judgment that plaintiff take nothing by this action, and that defendants have and recover from plaintiff their costs, and that they have such other and further relief as may be just and equitable.

HEPBURN WILKINS,
Attorney for Defendants.

[Duly verified.] [Duly filed.]

[Title of Court and Cause.]

January 28, 1895.

ORDER ALLOWING SUPPLEMENTAL ANSWER AND CROSS-COMPLAINT.

The plaintiff's motion to set the above entitled cause
11 for trial, came on this day regularly to be heard: whereupon defendant's attorney moved for leave to file a supplemental answer and cross-Complaint setting up the matter set fort in the cross-Complaint filed by the defendants in case No. 1316 in the above entitled Court, and after hearing counset forth in the cross-Complaint filed by the defendants in case for plaintiff in opposition thereto.

It is ordered, that the hearing of the motion to set this cause for trial be continued until Monday, the fourth day of February, 1895, at ten and one-half o'clock A. M., and that defendants have until twelve o'clock M. of Friday, the first day

of February, 1895, within which to file and serve the supplemental pleadings above designated.

[Title of Court and Cause.]

SUPPLEMENTAL ANSWER.

Now come the defendants, Peter Gardner and Jacob Gardner, and by leave of the Court first had and obtained, file this, their additional and supplemental answer to the Complaint herein, and for further, separate, supplemental and additional answer to each of the causes of action set forth in said complaint allege:

1st. That on or about the 2nd day of October, 1834, Jose Figueroa, as the Governor of California, under the government of Mexico, granted to one Juan Reed a certain tract of land, situated in the State of California, and in what afterwards became the county of Marin, being the tract of land known as and called the Rancho Corte Madera del Presidio.

2d. That defendants aver on their information and belief that the said Rancho granted as aforesaid, included within its exterior limits the land hereinafter mentioned, which was conveyed by the deed hereinafter mentioned from T. B. Deffebach et al. to Julius C. McCeney, dated February 14th, 1871.

3rd. That in the year 1843, Juan Reed died intestate in the said State of California, leaving surviving him his four children, to wit: His son, John J. Reed, his daughter,
12 Maria Inez Reed, who afterwards intermarried with one Thomas B. Deffebach, and thereafter bore the name of Deffebach, his daughter, Hilarita Reed, also known as Hilaria Reed and as Hilaria M. Reed, and his son, Ricardo Reed, which children were the only heirs at law of said Juan Reed, and that the said Ricardo Reed died in the year 1853, intestate, and under twenty-one years of age, leaving the said other children of said Juan Reed, his only heirs at law.

4th. That on or about the 12th day of June, 1854, the Board of Land Commissioners for the State of California made and entered a judgment and order confirming the said grant. That thereafter an appeal was taken from the judgment or order aforesaid of the said Board of Land Commissioners, to the District Court of the United States in and for the District of California. That thereafter, on the 14th day of January, 1856, a judgment and decree was duly made and entered in the said District Court, whereby it was adjudged that the claim of the

appellees who were the said heirs of the said Juan Reed, was a good and valid claim, and that the said claim be and the same was thereby confirmed to the extent and quantity of one square league, being the same land described in the said grant, and of which possession was proved to have been long enjoyed, provided that the said quantity of one square league then confirmed be contained within the boundaries called for in the said grant, and the map to which the grant refers, and if there should be less than that quantity within said boundaries, then that the Court confirmed to the claimants that less quantity.

5th. That in the year 1858, a survey of the said Mexican grant was made by the United States Deputy Surveyor, R. C. Mathewson, generally known as the "Mathewson survey," and the defendants aver on their information and belief that the land described in the said deed from T. B. Deffebach et al. to Julius C. McCeney, was outside of the exterior boundaries of said Mathewson survey, and within the exterior boundaries of said Mexican grant. That the said Mathewson survey never became final, and that thereafter, in the year 1872, the said Mathewson survey was set aside by the authorities of
13 the United States, and a new survey ordered by said authorities.

6th. That defendants aver on their information and belief that thereafter, in the months of November and December, 1873, and June, 1874, a re-survey was made by the authorities of the United States of the lands embraced by the said Mexican grant, and that said last survey of said Mexican grant became the final survey and official survey thereof.

7th. That on the 25th day of February, 1885, a patent was issued by the United States to the said John J. Reed, Maria Inez Reed and Hilarita Reed, for the said Mexican grant of land as surveyed by the survey last mentioned, and that by the said last mentioned survey and the said patent, the land described in the said deed from said T. B. Deffebach et al. to said Julius C. McCeney was excluded.

8th. That on or about the 12th day of August, 1865, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach and T. B. Deffebach, her husband, made, executed and delivered for a valuable consideration to J. Clinton Bolton, a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in the said Mathewson survey.

9th. That on or about the 16th day of September, 1865, said

Bolton made, executed and delivered to R. Steinback all the undivided one-fourth part of all the said Mexican grant which was not included in said Mathewson survey.

10th. That on or about the 28th day of March, 1866, said R. Steinback made, executed and delivered to Emil Steinback a deed whereby he conveyed to Emil Steinback the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

11th. That on or about the 16th day of June, 1866, said Emil Steinback made, executed and delivered to Emil Grisar a deed whereby he conveyed to said Grisar the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

12th. That on the 19th day of June, 1866, the said
14 Emil Grisar made, execupted and delivered to Samuel R. Throckmorton, a deed, whereby he conveyed to said Throckmorton all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

13th. That on or about the 26th day of July, 1868, the said J. Clinton Bolton made, executed and delivered to T. B. Valentine a deed, whereby he conveyed to said Valentine all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

14th. That on or about the 11th day of May, 1869, John J. Reed made, executed and delivered to Hugh A. Boyle a deed, whereby he conveyed to said Boyle all the undivided one-sixth part of all the said Mexican grant which was not included in the said Mathewson survey.

15th. That on or about the 24th day of May, 1869, the said Hilarita Reed made, executed and delivered to said Hugh A. Boyle a deed, whereby she conveyed to the said Boyle all the undivided one-sixth part of the said Mexican grant which was not included in the said Mathewson survey.

16th. That on or about the 1st day of February, 1871, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall made, executed and delivered to Julius C. McCeney a deed, whereby they conveyed to said McCeney all that certain tract of land situated in the County of Marin, State of California, bounded and described as follows, to wit:

Beginning at a post marked "C. M. P. 181," distant 20 chs. north of corner sections 28, 29, 32 and 33, in township one north, range six west, Mount Diablo meridian, from which a

madrona tree four feet in diameter, marked "B. J. C. M. P. 181," bears S. 24 deg. east 87 links distant, said post is station 181 on R. C. Mathewson's survey of the Rancho "Corte Madera del Presidio," as approved by the United States Surveyor General of the State of California, September 19th, 1859; thence along the line of said Mathewson's survey, E. 6.38 chs. to station, a post in stone mound, from which an oak tree 22 inches in diameter, bears N. 17½ deg. W. 33 chs. and said madrona tree bears S. 82½ deg. W.; thence leaving said Mathewson's survey, N. 9 deg. W. 29.90 chs. to station; thence 70¾ deg. W. 10.70 chains to station post marked "A"; thence S. 73¾ deg. W. 16.65 chs. to station in center of the creek, known as the "Arroyo de Corte Madera del Presidio;" thence down the center of said creek with the meanders thereof according to William J. Lewis' survey of the Rancho Saucelito, approved October 2d, 1860, by the said Surveyor General, S. 39¾ deg. E. 1.50 chs. to station 11 of said Lewis' survey; thence S. 4.½ deg. E. 10.74 chs. to station 12 of said Lewis' survey; thence S. 17 deg. E.8.50 chs. to station 13 of said Lewis' survey; thence S. 35 deg. E. 10.30 chs. to station 14 of said Lewis' survey; thence S. 71.¼ deg. E. 10.78 chs. to station 15 of said Lewis' survey; thence N. 70.¾ deg. E. 3.90 chs. to station 16 of said Lewis' survey; thence S. 33.¾ deg. E. 0.40 chs. to station in center of said Arroyo, and on line between sections 28 and 29, township one north, range six west, 17.55 chs. north of corner sections 28, 29, 32 and 33; thence leaving said creek and survey, N. 2.45 chs. to the post marked "C. M. P. 181," the place of beginning. Containing 80.24-100 acres of land.

17th. That on or about the 19th day of January, 1875, the said Julius C. McCeney made, executed and delivered to Samuel R. Throckmorton a deed, whereby he conveyed to said Throckmorton all of the land described in said deed of February 1st, 1871, from Thos. B. Deffebach et al. to said Samuel R. Throckmorton.

18th. Defendants aver on their information and belief that each and all of the grantees named in the deeds aforesaid purchased the lands and interest therein which the said deeds purportd to convey in good faith and for a valuable consideration, and that the said grantees used, improved and continued in the actual possession of the said lands, including lot 3 in section 28 and lot 3 in section 29, in township one north, range six west, according to the United States Government surveys according to the lines of their original purchases, and that

said lands were so used and improved as tenants in
16 common by the said various grantees, until the 14th day of February, 1871, on which day the various tenants in common, except said Throckmorton, made the conveyance aforesaid to said Julius C. McCeney, and that said conveyance was made to said McCeney, in trust for said Throckmorton, and in order to segregate the interest of said Throckmorton in said lands and convey the same in severalty to said Throckmorton, and in pursuance of said trust, the said McCeney made, executed and delivered the said deed of January 19th, 1875, to said Throckmorton, and that ever since the said 1st day of February, 1871, up to the date of the deed to defendant, Jacob Gardner, hereinafter mentioned, the said Throckmorton and the executrix of his will after his death, used and improved, and continued in the actual possession of the land described in the said deed of February 1st, 1871, to the said McCeney, and the said deed of January 19th, 1875, to said Throckmorton, substantially according to the lines of the said deeds, and that the said Throckmorton, and all said other grantees at the dates of said several purchasers, believed in good faith that all of the lands conveyed by said deeds as aforesaid, were included within the said Mexican grant to the said Juan Reed, and that the said Throckmorton, in good faith, entertained such belief until the date of his death, and that the said Mexican grant aforesaid did purport to grant and convey all of the said lands described in the said deeds to the said McCeney and the said Throckmorton.

19th. That on or about the 19th day of January, 1875, the said Throckmorton, as a bona-fide purchaser from Mexican grantees, made an application to the register and receiver of the United States Land Office at San Francisco, under Sec. 7 of the Act of the Congress of the United States, entitled "An Act to quiet titles in California," approved July 23d, 1866, basing his application upon the facts hereinbefore set forth, and that the said Ebenezer Wormouth was a party defendant upon the said application of said Throckmorton in said land office, and claimed the said land as a pre-emptor, and contested said application.

20th. The defendants aver on their information and
17 belief, that evidence was introduced in the matter of the application and contest aforesaid, showing without conflict that all the facts hereinbefore set forth were true, and establishing all of said facts by competent evidence, but that, notwithstanding the said evidence which was given as afore-

said in said United States Land Office in San Francisco upon the said contest, and notwithstanding that there was no conflict in said evidence, and no evidence whatever on said contest which contradicted the said evidence or any part thereof, and that the said evidence was true, the register and receiver of the land office at San Francisco, on or about the 9th day of February, 1886, basing their decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced before them on said application as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, denied the application of said Throckmorton to purchase the said land, and that on appeal from the said decision to the commissioner of the General Land Office of the United States, on the proofs taken before the said register and receiver, the said commissioner, on or about the 18th day of June, 1890, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, affirmed the said decision of said register and receiver, and that on appeal from said decision of said commissioner, the Secretary of the Interior of the United States, on or about the 24th day of October, 1891, on the same proofs, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said lands, affirming the decision of the said commissioner, denying the application of said Throckmorton to purchase said land under said act.

21st. That thereafter, upon the return of the instructions of the superior officers on said appeals to the United
18 States Land Office at San Francisco, the register and receiver of the said land office, on or about the 20th day of July, 1892, notwithstanding the application of the said Thockmorton, and notwithstanding the fact that the said Throckmorton was entitled to purchase the said land under the said Act of Congress, did, contrary to aw, and basing their action on the erroneous construction of the law applicable to the case before them, and against the protest and objection of the representatives of the said Throckmorton, allow the said plaintiff, Wormouth, to make proof and payment for the said land described in said deed to said Throckmorton, and issued

to the said Wormouth a certificate of purchase for the said land as a commuted homestead entry.

22nd. That thereafter, on the 14th day of August, 1893, and in pursuance of the said certificate of purchase and the rulings aforesaid of said officers of the Land Department of the United States, a patent was issued by the President of the United States to the said plaintiff, Ebenezer Wormouth, purporting to convey to him the lands described in the said deed to said Throckmorton.

23d. That on or about the 28th day of May, 1883, the said Samuel R. Throckmorton died in the City and County of San Francisco, State of California, leaving a will by which he bequeathed to his daughter, Susanna M. Throckmorton, all his property and estate.

24th. That on-on about the 27th day of June, 1883, an order was duly given and made in and by the Superior Court of the City and County of San Francisco, State of California, whereby the said Susanna M. Throckmorton, who was named in said will as the executrix thereof, was duly appointed as such executrix, and whereby letters testamentary were duly ordered to be issued to her.

25th. That thereafter, on the 27th day of June, 1883, letters testamentary upon the estate of said decedent were duly issued to the said Susanna M. Throckmorton, who then was and up to the date of the distribution of the estate of said decedent continued to be, the duly appointed, qualified
19 and acting executrix of the will of said decedent.

26th. That on or about the 23rd day of September, 1889, an order and decree was duly given and made in and by said Superior Court of said City and County, whereby the whole estate, real and personal, of said decedent was distributed to the said Susanna M. Throckmorton.

27th. That on or about the 17th day of July, 1890, the said Susanna M. Throckmorton, made, executed and delivered to the defendant, Jacob Gardner, a deed, whereby she conveyed to the said defendant all those certain parcels of land situate, lying and being in the County of Marin, State of California, and described as follows, to wit:

Lot 3 of section 28 and lot 3 of section 29, township one north, range 6 east, Mt. Diablo base and meridian. Containing 43 acres of land, more or less. Being a part of the property conveyed by and described in said deed from Julius C. McCeney to Samuel R. Throckmorton.

28th. That on the said 17th day of July, 1890, defendant, Jacob Gardner, entered under the said last mentioned deed

into the possession, and has since hitherto remained in the possession of the land conveyed by and described in the said deed, except so much thereof as is described as follows, to wit:

Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chs. to a post marked "C. M. P. 181"; thence north 9 deg. east to a road known as the Blythedale road; thence northwesterly along said road about 10 chs. to a fence; thence southwesterly along said fence to a creek on the easterly boundary line of the Rancho Saucelito; thence descending the said creek to the point of beginning.

29th. That the defendant, Jacob Gardner, was always prevented by the plaintiff from entering into the possession of said excepted parcel.

30th. And defendant, Jacob Gardner, avers that he is the owner in equity of the said land described in the said deed from Susanna M. Throckmorton to him, and that the legal title to said land which is included in said patent from the United States to Ebenezer Wormouth, is held in trust by the said plaintiff, Wormouth, for the defendant, Jacob Gardner.

31st. That the defendant, Peter Gardner is, and was at the date of the commencement of this action, in possession of certain portions of the lands described in said complaint, as the tenant of the said defendant, Jacob Gardner.

Wherefore, defendants pray that plaintiff take nothing by this action, and that it be adjudged and decreed that the land described in the said deed from Susanna M. Throckmorton to the defendant, Jacob Gardner, and the title thereof conveyed by the patent from the United States to the plaintiff, issued on the 14th day of August, 1893, is held by the plaintiff in trust for the defendant, Jacob Gardner, and that the said plaintiff be commanded and required to execute, acknowledge and deliver to the defendant, Jacob Gardner, a deed conveying to said defendant all of the land described in the deed from said Susanna M. Throckmorton, and that defendants have such other relief as may be just and equitable, together with the costs of this action.

HEPBURN WILKINS,
Attorney for Defendants.

[Duly verified.] [Duly filed.]

CROSS COMPLAINT OF JACOB GARDNER.

[Title of Court and Cause.]

Now comes the defendant, Jacob Gardner, and by leave of the Court first had and obtained, files this his cross-complaint against the plaintiff in the above-entitled action, and for cross-complaint against the plaintiff alleges:

1st. That on or about the second day of October, 1834, Jose Figueroa, as the Governor of California, under the government of Mexico, granted to one Juan Reed a certain tract of land situated in the State of California, and in what afterwards became the County of Marin, being the tract of land known as and called the Rancho Corte Madera del Presidio.

2d. Defendant avers on his information and belief that the said Rancho granted as aforesaid included within its exterior limits the land hereinafter mentioned, which was conveyed by the deed hereinafter mentioned, from T. B. Deffebach et al. to Julius C. McCeney, dated February 14th, 1871.

3d. That in the year 1843 Juan Reed died died intestate in the said State of California, leaving surviving him four children, to wit: his son, John J. Reed, his daughter, Maria Inez Reed, who afterwards intermarried with one Thomas F. Deffebach, and thereafter bore the name of Deffebach; his daughter, Hilarita Reed, also known as Hilaria Reed and as Hilaria M. Reed, and his son, Ricardo Reed, which children were the only heirs-at-law of said Juan Reed, and that the said Ricardo Reed died in the year 1853, intestate, and under twenty-one years of age, leaving the said other children of said Juan Reed his only heirs-at-law.

4th. That on or about the 12th day of June, 1854, the Board of Land Commissioners for the State of California made and entered a judgment and order confirming said grant. That thereafter an appeal was taken from the judgment or order aforesaid of the said Board of Land Commissioners to the District Court of the United States in and for the District of California: That thereafter, on the 14th day of January, 1856, a judgment and decree was duly made and entered in the said District Court, whereby it was adjudged that the claim of the appellees who were the said heirs of said Juan Reed was a good and valid claim, and that the said claim be and the same was thereby confirmed to the extent and quantity of one square league, being the same land described in the said grant, and of which possession was proved to have been long enjoyed, provided that the said quantity of one square league

then confirmed be contained within the boundaries called for in the said grant, and the map to which the grant refers, and if there should be less than that quantity within said boundaries, then that the Court confirmed to the claimants that less quantity.

5th. That in the year 1858 a survey of the said Mexican grant was made by the United States Deputy Surveyor, R. C. Mathewson, generally known as the "Mathewson sur-
22 vey," and the defendant avers on his information and belief that the land described in the said deed from T. B. Deffebach et al. to Julius C. McCeney was outside of the exterior boundaries of Mathewson survey, and within the exterior boundaries of said Mexican grant. That the said Mathewson survey never became final, and that thereafter, in the year 1872, the said Mathewson survey was set aside by the authorities of United States, and a new survey ordered by said authorities.

6th. The defendant avers on his information and belief that thereafter, in the months of November and December, 1873, and June, 1874, a re-survey was made by the authorities of the United States of the lands embraced by the said Mexican grant, and that said last mentioned survey of said Mexican grant became the final survey and official survey thereof.

7th. That on or about the 25th day of February, 1885, a patent was issued by the United States to the said John J. Reed, Maria Inez Reed and Hilarita Reed for the said Mexican grant of land as surveyed by the survey last mentioned, and that by the said last mentioned survey and the said patent the land described in the said deed from said T. B. Deffebach et al. to said Julius C. McCeney was excluded.

8th. That on or about the 12th day of August, 1865, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach and T. B. Deffebach, her husband, made, executed and delivered for a valuable consideration to J. Clinton Bolton, a deed, whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in the said Mathewson survey.

9th. That on or about the 16th day of September, 1865, said Bolton made, executed and delivered to R. Steinback
23 all the undivided one-fourth part of all the said Mexican grant which was not included in said Mathewson survey.

10th. That on or about the 28th day of March, 1866, said R. Steinback made, executed and delivered to Emil Steinback

a deed, whereby he conveyed to said Emil Steinback the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

11th. That on or about the 16th day of June, 1866, said Emil Steinbach made, executed and delivered to Emil Grisar a deed whereby he conveyed to said Grisar the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

12th. That on the 19th day of June, 1866, the said Emil Grisar made, executed and delivered to Samuel R. Throckmorton, a deed, whereby he conveyed to said Throckmorton all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

13th. That on or about the 26th day of July, 1868, the said J. Clinton Bolton made, executed and delivered to T. B. Valentine, a deed, whereby he conveyed to said Valentine all the undivided one-fourth part of all the said Mexican grant which was not included in the said Mathewson survey.

14th. That on or about the 14th day of May, 1869, John J. Reed made, executed and delivered to Hugh A. Boyle a deed, whereby he conveyed to said Boyle all the undivided one-sixth part of all the said Mexican grant which was not included in the said Mathewson survey.

15th. That on or about the 24th day of May, 1869, the said Hilarita Reed made, executed and delivered to said Hugh A. Boyle a deed, whereby she conveyed to the said Boyle all the undivided one-sixth part of the said Mexican grant which was not included in the said Mathewson survey.

16th. That on or about the 1st day of February, 1871, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall made, executed and deliv-
24 ered to Julius C. McCeney a deed, whereby they conveyed to said McCeney all that certain tract of land situated in the County of Marin, State of California, bounded and described as follows, to wit:

Beginning at a post marked "C. M. P. 181," distant 20 chains north of corner sections 28, 29, 32 and 33 in township one north, range six west, Mount Diablo meridian, from which a madrona tree four feet in diameter, marked "B. J. C. M. P. 181," bears S. 24 deg. east 87 links distant; said post is station 181 on R. C. Mathewson's survey of the Rancho "Corte Madera del Presidio," as approved by the United States Surveyor General of the State of California, September 19th, 1859; thence along the line of said Mathewson's survey E. 6.38 chs. to station, a post in stone mound from which an oak tree 22 inches

in diameter bears N. 17½ deg. W. 33 chs., and said madrona tree bears S. 82½ deg. W.; thence leaving said Mathewson's survey, N. 9 deg. W. 29.90 chs. to station; thence N. 70¾ deg. W. 10.70 chains to station post marked "A"; thence S. 73¾ deg. W. 16.65 chs. to station in center of the creek, known as the "Arroyo de Corte Madera del Presidio"; thence down the center of said creek with the meanders thereof according to William J. Lewis' survey of the Rancho Saucelito, approved October 2d, 1860, by the said Surveyor General, S. 39¾ deg. E. 1.50 chs. to station 11 of said Lewis' survey; thence S. 4½ deg. E. 10.74 chs. to station 12 of said Lewis' survey; thence S. 17 deg. E. 8.50 chs. to station 13 of said Lewis' survey; thence S. 35 deg. E. 10.30 chs. to station 14 of said Lewis' survey; thence S. 71¼ deg. E. 10.78 chs. to station 15 of said Lewis' survey; thence N. 70¾ deg. E. 3.90 chs. to station 16 of said Lewis' survey; thence S. 33¾ deg. E. 0.40 chs. to station in center of said Arroyo, and on line between sections 28 and 29, township one north, range six west, 17.55 chs. north of corner sections 28, 29, 32 and 33; thence leaving said creek and survey, N. 2.45 chs. to the post mar. "C. M. P. 181," the place of beginning. Containing 80 24-100 acres of land.

17th. That on or about the 19th day of January, 1875, the said Julius C. McCeney made, executed and delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all of the land described in said deed of February 1st, 1871, from said T. B. Deffebach et al. to said McCeney.

18th. Defendant avers, on his information and belief, that each and all of the grantees named in the deeds aforesaid purchased the lands and interests therein which the said deeds purported to convey in good faith and for a valuable consideration, and that the said grantees used, improved and continued in the actual possession of the said lands, including lot 3 in section 28 and lot 3 in section 29, in township one north, range six west, according to the United States Government surveys according to the lines of their original purchases, and that said lands were so used and improved as tenants in common by the said various grantees until the 14th day of February, 1871, on which day the various tenants in common, except said Throckmorton, made the conveyance aforesaid to said Julius C. McCeney, and that said conveyance was made to said McCeney, in trust for said Throckmorton, and in order to segregate the interest of said Throckmorton in said lands and convey the same in severalty to said Throckmorton, and in pursuance of

said trust, the said McCeney made, executed and delivered the said deed of January 19th, 1875, to said Throckmorton, and that ever since the said 1st day of February, 1871, up to the date of the deed to defendant, Jacob Gardner, hereinafter mentioned, the said Throckmorton and the executrix of his will after his death used and improved, and continued in the actual possession of the land described in the said deed of February 1st, 1871, to said McCeney, and the deed of January 19th, 1875, to said Throckmorton, substantially according to the lines of the said deeds, and that said Throckmorton, and all said other grantees, at the dates of said several purchases, believed in good faith that all of the lands conveyed by said deeds as aforesaid were included within the said Mexican grant to the said Juan Reed, and that the said Throckmorton, in good faith, entertained such belief until the date of his death, and
26 that the said Mexican grant aforesaid did purport to grant and convey all of the said lands described in the said deeds to the said McCeney and the said Throckmorton.

19th. That on or about the 19th day of January, 1875, the said Throckmorton, as a bona fide purchaser from Mexican grantees, made an application to the register and receiver of the United States Land Office at San Francisco, under Sec. 7 of the Act of the Congress of the United States, entitled "An Act to quiet titles in California," approved July 23rd, 1866, basing his application upon the facts hereinbefore set forth, and that the said Ebenezer Wormouth was a party defendant upon the said application of said Throckmorton in said land office, and claimed the said land as a pre-emptor, and contested said application.

20th. And defendant avers, on his information and belief, that evidence was introduced in the matter of the application and contest aforesaid, showing without conflict that all the facts hereinbefore set forth were true, and establishing all of said facts by competent evidence, but that, notwithstanding the said evidence which was given as aforesaid in said United States Land Office in San Francisco upon the said contest, and notwithstanding that there was no conflict in said evidence, and no evidence whatever on said contest which contradicted the said evidence or any part thereof, and that the said evidence was true, the register and receiver of the Land Office at San Francisco, on or about the 9th day of February, 1886, basing their decision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced before them on said application as aforesaid,

the said Throckmorton was not in law or under the law entitled to purchase the said land, denied the application of said Throckmorton to purchase the said land, and that on appeal from the said decision to the commissioner of the General Land Office of the United States, on the proofs taken before the said register and receiver, the said commissioner, on or about the 18th day of June, 1890, also basing his deci-
27 cision upon the evidence aforesaid, and resting the same upon the proposition of law, that under the evidence and facts introduced as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, affirmed the said decision of said register and receiver, and that on appeal from said decision of said commissioner, the Secretary of the Interior of the United States, on or about the 24th day of October, 1891, on the same proofs, also basing his decision upon the evidence aforesaid, and resting the same upon the proposition of law that under the evidence and facts introduced as aforesaid, the said Throckmorton was not in law or under the law entitled to purchase the said land, affirmed the said decision of the said commissioner, denying the application of said Throckmorton to purchase said land under said Act.

21st. That thereafter, upon the return of the instructions of the superior officers on said appeals to the United States Land Office at San Francisco, the register and receiver of the said land office, on or about the 20th day of July, 1892, notwithstanding the application of the said Throckmorton, and notwithstanding the fact that the said Throckmorton was entitled to purchase the said land under the said Act of Congress, did contrary to law, and basing their action on the erroneous construction of the law applicable to the case before them, and against the protest and objection of the representatives of said Throckmorton, allow the said plaintiff, Wormouth, to make proof and payment for the said land described in said deed to said Throckmorton, and issued to the said Wormouth a certificate of purchase for the said land as a commuted homestead entry.

22nd. That thereafter, on the 14th day of August, 1893, under and in pursuance of the said certificate of purchase and the rulings aforesaid of said officers of the Land Department of the United States, a patent was issued by the President of the United States to the said plaintiff, Ebenezer Wormouth, purporting to convey to him the lands described in the said deed to said Throckmorton.

23rd. That on or about the 28th day of May, 1883, the said Samuel R. Throckmorton died in the City and County
28 of San Francisco, State of California, leaving a will by which he bequeathed to his daughter, Susanna M. Throckmorton, all his property and estate.

24th. That on or about the 27th day of June, 1883, an order was duly given and made in and by the Superior Court of the City and County of San Francisco, State of California, whereby the said Susanna M. Throckmorton, who was named in said will as the executrix thereof, was duly appointed as such executrix, and whereby letters testamentary were duly ordered to be issued to her.

25th. That thereafter, on the 27th day of June, 1883, letters testamentary upon the estate of said decedent were duly issued to the said Susanna M. Throckmorton, who then was and up to the date of the distribution of the estate of said decedent continued to be the duly appointed, qualified and acting executrix of the will of said decedent.

26th. That on or about the 23rd day of September, 1889, an order and decree was duly given and made in and by said Superior Court of said city and county, whereby the whole estate real and personal of said decedent was distributed to the said Susanna M. Throckmorton.

27th. That on or about the 17th day of July, 1890, the said Susanna M. Throckmorton made, executed and delivered to the defendant, Jacob Gardner, a deed, whereby she conveyed to the said defendant, Gardner, all those certain parcels of land situate, lying and being in the County of Marin, State of California, and described as follows, to wit:

Lot 3 of section 28 and lot 3 of section 29, township one north, range six west, Mount Diablo base and meridian. Containing 43 acres of land more or less. Being a part of the property conveyed by and described in said deed from Julius C. McCeney to Samuel R. Throckmorton.

28th. That on the said 17th day of July, 1890, defendant, Jacob Gardner, entered under the said last mentioned deed into the possession, and has thence hitherto remained in the possession of the land conveyed by and described in the
29 said deed, except so much thereof as is described as follows, to wit:

Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chs. to a post marked "C. M. P. 181"; thence north 9 deg. east to a road known as the Blythedale road; thence northwesterly along said road about 10 chs. to a fence;

thence southwesterly along said fence to the creek on the easterly boundary line of the Rancho Saucelito; thence descending the said creek to the point of beginning.

That the defendant, Jacob Gardner, was always prevented by the plaintiff from entering into the possession of said excepted parcel.

29th. And defendant, Jacob Gardner, avers that he is the owner in equity of the said land described in the said deed from Susanna M. Throckmorton to him, and that the legal title to said land which is included in said patent from the United States to said Ebenezer Wormouth, is held in trust by the said plaintiff, Wormouth, for the defendant, Jacob Gardner.

Wherefore, defendant prays for a judgment of this Court that the land described in the said deed from Susanna M. Throckmorton to the defendant, Jacob Gardner, and the title thereof conveyed by the patent from the United States to the plaintiff, issued on the 14th day of August, 1893, is held by the plaintiff in trust for the defendant, Jacob Gardner, and that the said plaintiff be commanded and required to execute, acknowledge and deliver to the defendant, Jacob Gardner, a deed conveying to him all the said lands described in the said deed from Susanna M. Throckmorton, and including the land described in said Complaint, and that the defendant, Jacob Gardner, have such other and further relief as may be just and equitable, together with the costs of this action.

HEPBURN WILKINS,
Attorney for Defendant, Jacob Gardner.

[Duly verified.] [Duly filed.]

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[Title of Court and Cause.]

ANSWER TO CROSS-COMPLAINT.

The above-named plaintiff, Ebenezer Wormouth, answers the Cross-Complaint filed against him by the above-named defendant, Jacob Gardner, in the above entitled action as follows:

1. This plaintiff in answer to the second paragraph of said cross-complaint denies that the Rancho granted by the Governor of California, under the government of Mexico, to Juan Reed, included within its exterior limits the land described in the deed from T. B. Deffebach et al. to Julius C. McCeney of

February 14th, 1871, or any part thereof, except so much thereof as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al. Denies that the grant mentioned in the first paragraph of said cross-complaint included any part of the land in controversy in this action. Denies that any grant ever made by the Mexican Government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the 22nd paragraph of said cross-complaint.

2. Answering the fifth paragraph of said Cross-Complaint, this plaintiff denies that the land described in said deed of T. B. Deffebach et al. to Julius C. McCeney or any part thereof, except as in this answer hereinbefore set forth, was within the exterior boundaries of said Mexican grant.

3. Answering the eighth paragraph of said Cross-Complaint, this plaintiff denies that on the 12th day of August, 1865, or at any other time, John J. Reed, Hilarita M. Reed, Inez Reed Deffebach and T. B. Deffebach, her husband, or any of them, made, executed or delivered for a valuable or any consideration, except as hereinafter stated, to J. Clinton
31 Bolton, a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in said Mathewson survey, but plaintiff avers that the only consideration which passed from said Bolton to the said grantors was an agreement by said Bolton to give his services as an attorney before the United States Courts and authorities to procure a patent for more land than was included in said Mathewson survey, or if no more land was patented, to procure such patent for the land included in the Mathewson survey.

4. In answer to the sixteenth paragraph of said Cross-Complaint, plaintiff denies that on or about the 1st day of February, 1871, or on any other day, month or year, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall made, executed or delivered to Julius C. McCeney a deed whereby they conveyed all that certain tract of land situated in the County of Marin, State of California, bounded and described as set forth in said paragraph sixteen of said cross-complaint or any part of said land save and except a small part thereof which lies within the boundaries of the patent for said land which was issued to the said Reed heirs on the 25th of February, 1885, which said excepted portion of said land lies without the boundary of the

land described in plaintiff's complaint in this action; and in that behalf this plaintiff avers that neither the said T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine nor H. C. Newhall did, on or about the 1st day of February, 1871, or at any other time, own or was entitled to own or entitled to convey to any one any of the land described in said sixteenth paragraph of said cross-complaint, save and except that part thereof lying within the bounds of said Reed patent.

5. Answering the seventeenth paragraph of said cross-complaint, plaintiff denies that on or about the 19th day of January, 1875, or at any other time, the said Julius C. McCeney made, executed or delivered to Samuel R. Throckmorton a deed whereby he conveyed to said Throckmorton all of the land described in said deed of February 1st, 1871, from
32 said T. B. Deffebach et al. to said McCeney, or conveyed any part of said land to said Throckmorton save and except that portion thereof lying within the boundary of said Reed patent; and in that behalf this plaintiff further answering the seventeenth paragraph of said cross-complaint denies that said Julius C. McCeney did, on or about the 19th day of January, 1875, or at any other time, or at all, own, or was entitled to own, or was seized or possessed or was entitled to convey to any one any of the land mentioned and described in the said deed from said McCeney to said Throckmorton, save and except that portion which lies within the boundary of the land mentioned and described in plaintiff's complaint in this action.

6. Answering the eighteenth paragraph of said cross-complaint, this plaintiff denies that each, or all, or any, of the grantees named in the deeds mentioned or referred to in said eighteenth paragraph of said cross-complaint, purchased, or pretended to purchase, the lands or interests described or mentioned in said deeds, in good faith, or for a valuable consideration; denies that said grantees or any grantee named in said cross-complaint used or improved or continued in the actual possession of said lands, according to the lines of their original purchases or ever used, improved or possessed any part thereof, except as trespassers upon the possession and rights of this plaintiff, as alleged in his complaint in this action; denies that lot 3 in section 28 and lot 3 in section 29, township one north, range 6 west, were possessed or used or improved by any of the persons named as grantees in said cross-complaint as tenants in common or at all used by any of

said persons, except as trespassers as aforesaid, and denies that any part of said lot 3, in section 28, or of said lot 3, in section 29, was ever in the possession of the original purchaser, Bolton, or any of his grantees or successors in interest, until on or about the 1st day of October, 1872, when an attempt was made by said Throckmorton to enclose a portion of the public lands of the United States lying to the west of western boundary of the Rancho
33 Corte de Madera del Presidio, whereupon, to wit: on or about said 1st day of October, 1872, the plaintiff gave notice to said McCeney and said Throckmorton that the lands they were attempting to enclose or fence was owned and claimed by plaintiff. Denies that said deed to McCeney was made an order to segregate the interest, or any interest, of said Throckmorton. Denies that said Throckmorton or his executrix ever had any right to use or to improve any part of said lot 3 in section 28 or of said lot 3 in section 29; denies that said Throckmorton or his executrix was ever in the actual possession of the same or any part thereof except as intruders and trespassers upon the rights and possession of this plaintiff, and particularly deny that said defendants, or either of them, or any of their, or either of their, grantees or predecessors in interest were ever in the possession of the parcels designated respectively "A" and "B" in defendant's answer herein; denies that all, or any, of said grantees, particularly and specially said Throckmorton, believed in good faith, or at all believed, that all of the lands conveyed by said deeds, or any part or parcels of said lot 3 in section 28 and said lot 3 in section 29, were included within said Mexican grant, or that said Throckmorton in good faith, or at all, entertained any such belief; and denies that said Mexican grant did purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lot 3 in section 29.

7. Answering the nineteenth paragraph of said cross-complaint, this plaintiff denies that on or about the 19th day of January ,1875, or at any other time prior to October 20th, 1880, said Throckmorton made any application to the register and receiver, or either of them, to purchase said lands, and plaintiff denies that on said 20th day of October, 1880, or on said 19th day of January, 1875, or at any other time, the said Throckmorton, as a bona-fide purchaser from Mexican grantees, made an application to the register and receiver of the United States Land Office at San Francisco, under section 7 of the Act of Congress of the United States, entitled "An

Act to Quiet Titles in California," approved July 23,
34 1866, or basing his application upon the facts in said cross-complaint hereinbefore alleged, and denies that said Ebenezer Wormouth claimed said land on the hearing of said contest before said register and receiver as a pre-emptor. but on the contrary claimed the said land as a homestead claimant and offered proof of his entry and right as such homestead claimant.

7½. Answering the twentieth paragraph of said cross-complaint this plaintiff denies that the evidence introduced in the matter of the application and contest mentioned in nineteenth paragraph of said cross-complaint showed without conflict or showed at all that all the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are in this answer denied are or were true; denies that the evidence introduced in the matter of said application and contest established all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; denies that there was no conflict in said evidence; denies that there was no evidence whatever on said contest which contradicted Throckmorton's evidence or any part thereof; denies that the said alleged evidence was true; denies that the register and receiver of the land office in San Francisco, or either of them, on or about the 9th day of February, 1886, or at any other time, based their, or his, decision upon said alleged evidence or upon evidence without conflict; denies that said register and receiver, or either of them, rested their or his decison upon the proposition or upon a proposition of law that the said Throckmorton was not in law, or under the law, entitled to purchase the said land; denies that the Commissioner of the General Land Office, on appeal from the decision of the register and receiver, basing his decision upon evidence without conflict, or resting his decision upon the or upon a proposition of law, decided that said Throckmorton was not in law entitled to purchase said land; denies that the Secretary of the Interior based his decision upon evidence without conflict; denies that the said Secretary
of the Interior rested his decision, affirming the decision
35 of the Commissioner of the General Land Office upon the or upon a proposition of law; denies that said Throckmorton was a bona-fide purchaser from the Mexican grantees of the lands described in paragraph sixteen of said cross-complaint.

8. Denies that said Throckmorton as a bona-fide purchaser

from the Mexican grantees made the application to the register and receiver of the United States Land Office at San Francisco under section 7 of the Act of Congress entitled, "An Act to Quiet Titles in California"; denies that said Throckmorton was entitled to purchase said land, or any part thereof, under said Act of Congress; denies that the register and receiver of the land office at San Francisco did contrary to law; or did, basing their decision on an erroneous construction of the law applicable to the case before them, allow this plaintiff to make proof and payment for said land.

9. This plaintiff in answer to the matters alleged in paragraph twenty-seven of said cross-complaint denies that on or about the 17th day of July, 1890, or at all, the said Susanna Throckmorton made, executed or delivered to the defendant Jacob Gardner, a deed whereby she conveyed to said defendant, Gardner, all those certain parcels of land described as lot 3 of section 28 and lot 3 of section 29, township 1 north, range 6 west, Mount Diablo base and meridian. And in that behalf this plaintiff avers that said Susanna Throckmorton was not the owner of said land when she executed the alleged deed nor was she entitled to convey the same to said Gardner.

10. This plaintiff denies that on the 17th day of July, 1890, or at any other time, the defendant, Jacob Gardner, entered into the possession of said land under said deed from said Susanna M. Throckmorton, and denies that he has ever since remained in possession of said land except as an intruder and trespasser upon the possession of this plaintiff and further denies that said defendant, Jacob Gardner, ever entered into the actual or other possession of any part of the lands described respectively as "A" and "B" in the defendant's answer herein.

11. This plaintiff denies that said Jacob Gardner is, or ever was, the owner in equity of said land or of any part of
36 the land described in plaintff's complaint in this action, and in the United States patent issued to him on the 14th day of August, 1893, as alleged in the twenty-second paragraph of said cross-complaint; denies that this plaintiff holds said land or part thereof in trust, or otherwise or at all for the defendant, Jacob Gardner.

Wherefore plaintiff prays that defendant, Jacob Gardner, take nothing by his said cross-complaint, that the same be dis-

missed, and that plaintiff have judgment as prayed in his complaint herein.

E. B. MAHON and
L. D. McKISICK,
Attorneys for Plaintiff.

[Duly verified.] [Duly filed.]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly for trial without a jury, as to the issues raised and joined by the answer of the plaintiff to the cross-complaint of the defendant, Jacob Gardner, herein, and the like issues raised by the supplemental answer of said Peter Gardner and said Jacob Gardner, on file herein, a jury trial as to said issues having been duly waived. The plaintiff appeared by Messrs. E. B. Mahon and L. D. McKisick, his attorneys, and the defendants appeared by H. Wilkins, Esq., their attorney.

Evidence was introduced on behalf of the respective parties, and the case was duly argued and submitted, and by the Court taken under advisement, and the Court, being now fully advised, finds the following facts:

1st. That on the 20th of October, A. D. 1880, S. R. Throckmorton, defendant Jacob Gardner's predecessor in interest, filed an application in the office of the register and receiver of the United States Land Office at San Francisco, Cali-
37 fornia, to purchase lot 3 in section 28 and lots 2 and 3 and SE. ¼ and NE. ¼ section 29, township 1 north, range 6 west, Mount Diablo Meridian, under the seventh section of the Act of Congress of the United States, entitled "An Act to Quiet Land Titles in California," approved July 23rd, 1866.

That the plaintiff, Ebenezer Wormouth, was a party defendant upon said application of said Throckmorton in said land office, and on the hearing thereof claimed the said lot 3 in section 28 and said lots 2 and 3 in section 29, as a homestead claimant, and contested said application of Throckmorton.

2nd. That one of the questions decided by the United States register and receiver, and confirmed by the United States Commissioner of the General Land Office, and by the United States Secretary of the Interior in the said contest of Throckmorton vs. Wormouth, mentioned in the twentieth

paragraph of said cross-complaint herein, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed.

3rd. That the officers of the United States Land Department, to wit, the register and receiver, the Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact upon the evidence produced before said register and receiver on said contest, that the land in controversy in this action was not included in the said original grant by the Mexican government to Juan Reed.

4th. That a survey known as the Mathewson survey of said Rancho Corte de Madera del Presidio (commonly called the Reed Ranch) mentioned in the first paragraph of said cross-complaint, was made by authority of the United States, about seven years before the date of the deed of August 12th, 1865, from John J. Reed and others to J. Clinton Bolton, under whom defendant, Jacob Gardner, deraigns title, being the deed mentioned in the eighth paragraph of said cross-complaint. That said survey excluded the lands in controversy, and no survey of the said Rancho Corte de Madera del Presidio ever made by authority of the United States in-
38 cluded the lands in controversy.

5th. That the consideration paid by said Bolton to the Reed heirs (John J. Reed and others) for the said deed to him of 1865 was not a money consideration, that the only consideration which passed from said Bolton to the said grantors was an agreement by said Bolton to give his services as an attorney before the United States Courts and authorities to procure a patent for more land than was included in said Mathewson survey, or if no more land was patented, to procure such patent for the land included in the Mathewson survey.

6th. That the officers of the United States Land Department, to wit, the United States register and receiver, the Commissioner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of "Throckmorton vs. Wormouth," in denying said application of Throckmorton, did not base their decision upon a question of law alone, but did find and decide as a fact that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns.

7th. This Court further finds as follows: That the rancho granted by the Governor of California, under the government of Mexico, to Juan Reed, did not include within its exterior

limits the land described in the deed from T. B. Deffebach et al. to Julius C. McCeney of February 14, 1871, or any part thereof, except so much thereof as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al. That the grant mentioned in the first paragraph of said cross-complaint did not include any part of the land in controversy in this action. That no grant ever made by the Mexican government to Juan Reed or to his successors in interest included any part of the land described and granted to plaintiff by the United States patent mentioned in the twenty-second paragraph of said cross-complaint.

8th. That the land described in said deed to T. B. Deffebach et al. to Julius C. McCeney, or any part thereof, except
39 as in the last finding above set forth, was not within the exterior boundaries of said Mexican grant.

9th. That on the 12th day of August, 1865, John J. Reed and others made, executed and delivered to J. Clinton Bolton, for the consideration mentioned in the fifth finding above set forth, a deed whereby they conveyed to him all of the undivided one-half of said Mexican grant which was not included in said Mathewson survey.

10th. That on or about the 1st day of February, 1871, T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall made, executed and delivered to Julius C. McCeney a deed purporting to convey all that certain tract of land, situated in the County of Marin, State of California, bounded and described as set forth in paragraph sixteen of said cross-complaint.

But that neither the said T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle nor H. C. Newhall did on the said 1st day of February, 1871, or at any other time, own, or was or were entitled to convey to any one any of the land described in said sixteenth paragraph of said cross-complaint, except a small part thereof which lies within the boundaries of the patent for certain land, which was issued to the said Reed heirs on the 25th day of February, 1885, which said excepted portion of land lies entirely without the boundary of the land described in plaintiff's complaint in this action.

11th. That on the 19th day of January, 1875, the said Julius C. McCeney made, executed and delivered to S. R. Throckmorton a deed purporting to convey to said Throckmorton all of the land described in the said deed of February 1, 1871, from said T. B. Deffebach et al. to said McCeney, but

that the said McCeney on said 19th day of January, 1875, or at any other time, was not the owner and was not entitled to convey to any one any of the land mentioned and described in said deed from said McCeney to said Throckmorton, save and except that portion which lies within the boundary of said Reed patent, no part of which lies within the boundary of the land mentioned and described in plaintiff's complaint in this action.

12th. That none of the grantees named in the deeds mentioned or referred to in the eighteenth paragraph of said cross-complaint, purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and right of the plaintiff, as alleged in his complaint in this action.

That neither the said Throckmorton, nor his executrix, ever had any right to use or improve any part of said lot 3 in section 28 or of said lots 2 and 3 in section 29; that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff.

That the said defendants, nor either of them, nor any of their nor either of their grantors or predecessors in interest, ever were in the possession of the parcels designated respectively "A" and "B" in defendants' answer herein.

That the said grantees and each of them and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by said deeds, or any part or parcel of said lot 3 in section 28 and said lots 2 and 3 in section 29, were included within the said Mexican grant.

That said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lots 2 and 3 in section 29.

13th. That the evidence introduced in the matter of the application and contest mentioned in the nineteenth paragraph of said cross-complaint, did not show without conflict, or show at all, that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true; that the evidence introduced in the matter of said application and contest did not establish all of said facts, or any material fact in favor of Throckmorton's right to purchase said land by competent or any evidence; that there was

41 conflict in said evidence; that there was evidence on said contest which contradicted Throckmorton's evidence; that the evidence as alleged in said cross-complaint was not true.

That the register and receiver of the land office at San Francisco did not, nor did either of them, on the 9th day of February, 1886, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict; that the said register and receiver did not, nor did either of them, rest their or his decision upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law or under the law entitled to purchase the said land.

That the Commissioner of the General Land Office, on appeal from the decision of the register and receiver, did not base his decison upon evidence without conflict, and did not rest his decision upon the or upon a proposition of law, in deciding that Throckmorton was not entitled to purchase the said land.

That the said Secretary of the Interior did not rest his decision, affirming the decision of the Commissioner of the General Land Office, upon the or upon a proposition of law.

That the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of Throckmorton vs. Wormouth, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph sixteen of said cross-complaint.

14th. That the said Throckmorton did, claiming to be a bona fide purchaser from Mexican grantees, make said application (to purchase) to the register and receiver of the United States Land Office at San Francisco, under section 7 of the Act of Congress entitled, "An Act to Quiet Land Titles in California."

That the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns and was not entitled to purchase the said land or any part thereof under said Act of Congress.

That the Register and Receiver of the said land office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow the plaintiff to make proof and payment for said land.

15th. That on about the 17th day of July, 1890, Susanna M. Throckmorton made, executed and delivered to the

42 defendant, Jacob Gardner, a deed in due form purporting to convey to said defendant, Gardner, all those certain parcels of land described as lot 3 of section 28 and lots 2 and 3 in section 29, T. 1 N., R. 6 W., Mount Diablo base and meridian; but the said Susanna M. Throckmorton was not the owner of said land when she executed said deed, nor was she entitled to convey the same to said Gardner.

16th. That the defendant, Jacob Gardner, did not on the 17th day of July, 1890, or at any other time, enter into the possession of said land under said deed or remain in possession thereof, except as an intruder and trespasser upon the possession of the plaintiff, and that the said defendant, Jacob Gardner, never entered into the actual or other possessions of any part of the lands described respectively as "A" and "B" in the defendant's answer herein.

17th. That the said Jacob Gardner is not and never was the owner in equity of said land, or of any part of the land described in plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the twenty-second paragraph of said cross-complaint.

That said plaintiff does not hold said land or any part thereof in trust or otherwise or at all for defendant, Jacob Gardner.

And as a conclusion of law from the foregoing facts:

The Court finds that neither the said defendant, Jacob Gardner, nor the defendant, Peter Gardner, should take anything by said cross complaint, or by said supplemental answer.

Dated March 8th, 1897. F. M. ANGELLOTTI, Judge.

[Duly filed.]

The case was thereupon argued by counsel for the respective parties, and the Court instructed the jury as follows:

43 In this action the plaintiff, Ebenezer Wormouth, seeks to recover from the defendants, Jacob Gardner and Peter Gardner, the possession of certain land, with damages for its detention since February 1st, 1891.

The land in controversy is the 46.26-100 acre tract described in the complaint, excepting therefrom the two parcels described in the answer, of which two parcels it appears the plaintiff was at the time of the commencement of the action and ever since has been in possession.

The plaintiff alleges that he was on February 1st, 1891, and ever since has been the owner and entitled to the possession of the land in controversy, which is denied by defendants.

It has been duly stipulated between the parties to this action that all of the issues made by the pleadings in this action shall be tried and determined by the Court sitting without a jury, excepting only the issues as to the damages claimed by plaintiff and as to the value of the rents and profits of the lands in controversy, which issues are to be determined by you.

Determining the issues to be disposed of by it, the Court now finds the following facts from the evidence introduced on this trial, viz:

1st. Tht on the first day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of in the possession of and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains more or less to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being
44 lot 3 of section 28 and lot 3 of section 29, township No. 1 north, of range No. 6 west, M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

2d. That on said 1st day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except those portions thereof bounded and described as follows):

"A"—Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chains to a post marked "C. M. P. 181"; then north 9 degrees to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a

fence; thence southwesterly along said fence to the said creek; thence descending the said creek to the point of beginning.

"B"—Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of the said Blythedale road; running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of said rancho; thence along said fence north 8 degrees 10 minutes 514 5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence, running at an acute angle from said last fence; thence along said fence running at an acute angle south 8 degrees 30 minutes west 277 5-10 feet; south 16 degrees 55 minutes west 143 7-10 feet; south 22 degrees 11 minutes west to the said northerly line of said Blythedale road; thence southeasterly along the said northerly line of said road to the place of beginning).

And ever since has been wrongfully and unlawfully withheld and still withhold the possession thereof from plaintiff.

The above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs you that your verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the
45 land in controversy, i. e., all of the said 46 26-100 acre tract described in the Complaint. Save and except the two parcels thereof which are now in plaintiff's possession.

Counsel for defendants thereupon, before the jury retired, excepted in open Court to the following portions of the instructions to the jury, to wit:

1st. To that portion of the instructions in which the Court instructed the jury that on the 1st day of February, 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of the land described in the plaintiff's complaint, and also described in the said instruction.

2nd. To that portion of the instructions in which the Court instructs the jury that the above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs the jury that their verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, i. e., all of the 46 26-100 acre tract described in the complaint, save and ex-

cept the two parcels thereof which are now in plaintiff's possession.

[Duly filed.]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff for the recovery from the defendants of the possession of all the land in controversy (viz: the 46 26-100 acre tract described in the complaint, except the two portions thereof described in the answer and designated therein "A" and "B"), and we assess the damages for withholding the said
46 property at Two Thousand ($2,000) Dollars, for which sum we find for plaintiff against said defendants.

A. GERICKE, Foreman.

[Duly filed.]

[Title of Court and Cause.]

JUDGMENT.

This cause heretofore, to wit, on the 9th, 12th, 13th and 19th days of February, 1897, came on regularly for trial before the Court without a jury, as to the issues raised and joined by the answer of the plaintiff to the cross-complaint of the defendant, Jacob Gardner, herein, and the like issues raised by the supplemental answer of said Peter Gardner and said Jacob Gardner, on file herein, a jury trial as to said issues having been duly waived.

The plaintiff appeared by Messrs. E. B. Mahon and L. H. McKisick, his attorneys, and the defendants appeared by H. Wilkins, Esq., their attorney. Evidence was introduced on behalf of the respective parties and the case was duly argued and submitted, and by the Court taken under advisement, and afterwards, to wit, on the 8th day of March, 1897, the Court duly made and submitted its findings of fact and conclusions of law herein.

And afterwards, to wit, on the 19th, 20th and 21st days of April, 1897, this cause came on regularly for trial as to the issues raised and joined by the answer of the defendants to the plaintiff's amended complaint herein, a jury of twelve persons was regularly impaneled and sworn to try said action.

Witnesses on the part of the plaintiff and defendants, respectively, were sworn and examined, and oral and documentary evidence on behalf of the respective parties was offered and put in evidence.

47 After hearing the evidence and the arguments of the counsel, and the instructions of the Court, and the jury having retired to consider their verdict, and subsequently returned into Court, and being called answered to their names and say they find a verdict for plaintiff, as follows:

[Title of Court and Cause.]

"We, the jury in the above-entitled cause, find for the plaintiff for the recovery from the defendants of the possession of all the land in controversy (viz: the 46 26-100 acre tract described in the complaint, except the two portions thereof described in the answer and designated therein "A" and "B"), and we assess the damages for withholding the said property at Two Thousand ($2,000) Dollars, for which sum we find for plaintiff against said defendants.

"A. GERICKE, Foreman."

Wherefore by reason of the law and the findings and verdict aforesaid, it is ordered, adjudged and decreed that the defendant Jacob Gardner take nothing by his said cross-complaint, and that defendants take nothing by their supplemental answer herein, and that the plaintiff, Ebenezer Wormouth, do have and recover of and from the defendants, Peter Gardner and Jacob Gardner, the possession and restitution of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio, running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east 20.25 chains, thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning, being lot three (3) of Section twenty-eight (28) and lot three (3) of Section twenty-nine (29) in township No. 1 north, range

48 No. 6 west, M. D. M., containing forty-six and twenty-sixth hundredths (46 26-100) acres of land, with the tene-

ments, hereditaments and appurtenances thereunto belonging or in any wise appertaining (except that portion thereof bounded and described as follows:

"A." Beginning at a post marked "C. M. P. 180," running thenec due north 2.45 chains to a post marked "C. M. P. 181," thence north 9 degrees east to a road known as the Blythedale road, thence northwesterly along said road about 10 chains to a fence, thence southwesterly along said fence to the said creek, thence descending said creek to the point of beginning.

"B." Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of said Blythedale road, running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of the said rancho, thence along said fence north 8 degrees 10 minutes west 514 5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence, thence along said fence running at an acute angle south 8 degrees 30 minutes west 277 5-10 feet, south 16 degrees 55 minutes west 143 7-10 feet, south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.)

2nd. That the said plaintiff have and recover of and from the said defendants the sum of Two Thousand ($2,000) Dollars damages for withholding said property.

3rd. That the said plaintiff do have and recover of and from the said defendants his costs and disbursements herein, taxed at $240.76.

Done in open Court this 21st day of April, A. D. 1897.

F. M. ANGELOTTI, Judge.

Entered April 22nd, 1897.

THOS. S. BONNEAU, Clerk.

[Title of Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

To E. B. Mahon, Esq., and L. D. McKisick, Esq., Attorneys for Plaintiff—

Please take notice that the defendants above named intend to move and will move the above-entitled Court to set

49 aside and vacate the decision of the Court, the verdict of the jury and the judgment heretofore entered herein, and to grant a new trial of said action, and a new trial of all the issues made by the cross-complaint of the defendants and the answer thereto of the plaintiff, the supplemental answer of said defendants and all the issues determined and decided by the Court upon the plaintiff's complaint and the answer of the defendants thereto, and all the issues submitted to and determined by the jury in said action, and that said motion will be made upon the following grounds, to wit:

1st. Insufficiency of the evidence to justify the decision of the Court in said action.

2nd. Insufficiency of the evidence to justify each of the decisions of the Court in said action.

3rd. Insufficiency of the evidence to justify the verdict of the jury in said action.

4th. That the decision of the Court in said action is against law, and that each of the decisions of the Court therein is against law, and that the verdict of the jury in said action is against law.

5th. Errors of law occurring at the trial and excepted to by the plaintiff.

6th. Misconduct of the jury.

7th. Excessive damages appearing to have been given under the influence of passion and prejudice.

Said motion will be made on a Bill of Exceptions to be hereafter prepared, served, settled, allowed, signed and filed as provided by law and upon affidavits.

HEPBURN WILKINS,
Attorney for Defendants.

Due service of the within notice admitted this 27th day of April, 1897.

E. B. MAHON and
L. D. McKISICK,
Attorneys for Plaintiffs.

[Duly filed.]

BILL OF EXCEPTIONS.

PART I - - - EQUITABLE ISSUES.

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Be it remembered that this action came regularly on for trial on the 9th day of February, 1897, E. B. Mahon, Esq., and L. D. McKisick, Esq., appearing for the plaintiff, and Hepburn Wilkins, Esq., appearing for the defendants. The Court first proceeded with the trial of the issues raised by the cross-complaint of the defendant, Jacob Gardner, and the answer thereto of the plaintiff and the supplemental answer of the plaintiffs on file herein.

DERAIGNMENT OF TITLE.

The plaintiff offered and read in evidence the following deeds:

1st. A deed from John J. Reed, Hilarita M. Reed, Inez Reed Deffebach and Thomas B. Deffebach, her husband, to J. Clinton Bolton, dated August 12th, 1865, and recorded in Book "E" of Deeds, at page 400, in the County Recorder's office of Marin County, State of California, purporting to convey to said Bolton, in consideration of the sum of $1.00 and other good and valuable considerations, the undivided one-half of all that portion of the Mexican grant situated in Marin County, State of California, and known as the Rancho Corte Madera del Presidio, which was not included in what is known as the Mathewson survey of said grant, "made under instructions from the U. S. Surveyor General for the State of California by R. C. Mathewson, U. S. Deputy Surveyor, in October, 1858, and approved by Mandaville, U. S. Surveyor General for California, September 19th, 1859, said approved survey containing four thousand four hundred and sixty and twenty-four hundredths (4,460.24) acres of land, it being expressly understood that this deed conveys no interest in the 4,460.24 acres embraced in the above approved survey," which said Mathewson survey is mentioned and described in the said cross-complaint.

2nd. A deed from said James Clinton Bolton to R. Stein-

back, dated the 16th day of September, 1865, and recorded in Book "E" of Deeds, at page 417, purporting to convey, in consideration of the sum of $5.00, the undivided one-fourth of all that portion of the said Mexican grant which was not
51 included in said Mathewson survey.

3rd. A deed from R. Steinback to Emil Steinback, dated the 28th day of March, 1866, and recorded in Book "E" of Deeds, at page 569, in said Recorder's office, purporting to convey, in consideration of the sum of $1,000.00, to said Emil Steinbach the same land conveyed to him as aforesaid by said Bolton.

4th. A deed from Emil Steinback to Emil Grisar, dated the 16th day of June, 1866, and recorded in Book "F" of Deeds, at page 278, in said Recorder's office, purporting to convey, in consideration of the sum of $1,250.00, to the said Grisar the same land described in said deed from R. Steinback to Emil Steinback.

5th. A deed from Emil Grisar to Samuel R. Throckmorton dated the 19th day of June, 1866, and recorded in the said County Recorder's office, in Book "F" of Deeds, at page 278, purporting to convey to the said Throckmorton, in consideration of the sum of $1,250.00, the same land described in said deed from E. Steinback to E. Grisar.

6th. A deed from J. Clinton Bolton to T. B. Valentine, dated the 26th day of July, 1868, and recorded in said Recorder's office in Book "G" of Deeds, at page 116, purporting to convey to the said Valentine, in consideration of the sum of $1,500.00, all of the undivided one-fourth part of that portion of said Mexican grant which was not included in said Mathewson survey.

7th. A deed from John J. Reed to Hugh A. Boyle, dated the 11th day of May, 1869, and recorded in the said Recorder's office, in Book "J" of Deeds, at page 9, purporting to convey to said Boyle, in consideration of the sum of $5.00, all the right, title and interest of said John J. Reed in and to all of said "Rancho Corte Madera del Presidio," which is not included in said "Matthewson survey."

8th. A deed from Hilarita Reed to said Hugh A. Boyle, dated the 24th day of May, 1869, and recorded in Book "J" of Deeds, at page 11, purporting to convey to the said Boyle, in consideration of the sum of $5.00, all the right, title and
52 interest of said Hilarita Reed in and to all of said "Rancho Corte de Madera del Presidio," which is not included in said Matthewson survey.

9th. A deed from T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall to Julius C. McCeney, dated the 1st day of February, 1871, recorded in said Recorder's office in Book "J" of Deeds at page 24, purporting to convey to the said McCeney in consideration of $5.00 the tract of land described in the sixteenth paragraph of the said cross-complaint of the defendants herein.

10th. A deed from said Julius C. McCeney to Samuel R. Throckmorton, dated the 19th day of January, 1875, and recorded in the said Recorder's office in Book "Q" of Deeds at page 206, purporting to convey to said Throckmorton in consideration of the sum of $1.00 all of the said land described in said sixteenth paragraph of said cross-complaint.

11th. A deed from Susanna M. Throckmorton to the defendant, Jacob Gardner, dated the 17th day of July, 1890, and recorded in the said Recorder's office in Book "11" of Deeds at page 507, purporting to convey to said Jacob Gardner in consideration of the sum of $10.00 all of those parcels of land situated in said Marin County, State of California, and being lot No. 3 of section 28 and lot No. 3 of section 29 in township 1 north, range 6 west, Mount Diablo base and meridian, and containing 43 acres of land more or less, being a portion of the property conveyed by and described in said deed from Julius C. McCeney to said Samuel R. Throckmorton.

The plaintiff next offered and read in evidence the petition of Juan Reed to Jose Figueroa, Senor General of the Territory of Upper California, praying for the grant of the tract of land known as the Rancho Corte Madera del Presidio, dated September 4th, 1834, also the grant from said Jose Figueroa, Senor General, to the said Juan Reed, dated October 2nd, 1834, also certain other papers connected with said grant, all of which papers were in the Spanish language and correct translations of which are set forth in the testimony and proceedings in the contested land case of S. R. Throck-
53 morton vs. Ebenezer Wormouth, which was pending in the Land Office of the United States before the Register and Receiver of such land office in the city of San Francisco, which testimony and proceedings in said contested land case are hereinafter set forth and the translations aforesaid are here referred to, said translations being marked respectively Ex. "D," Ex. "E," and Ex. "D" and "E" and said translations were duly admitted by counsel to be correct. The defendants here offered in evidence the decree of confirmation by the Board of United States Land Commissioners to settle land

claims in California, filed June 13th, 1854, in case No. 497 before said Board in the case entitled "The Heirs of Juan Reed vs. The United States," and the decree of the United States District Court for the Northern District of California in case No. 183 entitled "The United States, Appellants, vs. Heirs of John Reed, Appellees," filed therein January 14th, 1856, confirming said grant, being Exhibit "F" and "G" in the record of said contested land case of S. R. Throckmorton vs. E. Wormouth hereinafter set forth.

The defendants then offered in evidence the diseno or map which was attached to the petition of Juan Reed to Jose Figueroa, Senor General of California, as the same appears in the transcript of the record from the Board of United States Land Commissioners in the case entitled The United States vs. Heirs of Juan Reed in the United States District Court for the Northern District of California, No. 183. The following is a certified copy of said diseno or map:

[Map.]

See original transcript.

I, Southard Hoffman, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be full, true and correct tracing of a map attached to the petition of Juan Reid, as the same appears in the Transcript of the Record from the Board of United States Land Commissioners in the case entitled "The United States vs. Heirs of Juan Reid," United States District Court, No. 183, now remaining on file in my office.

54 Attest my hand and seal of said District Court this 15th day of February, A. D. 1895.

SOUTHARD HOFFMAN,

[Seal] Clerk.

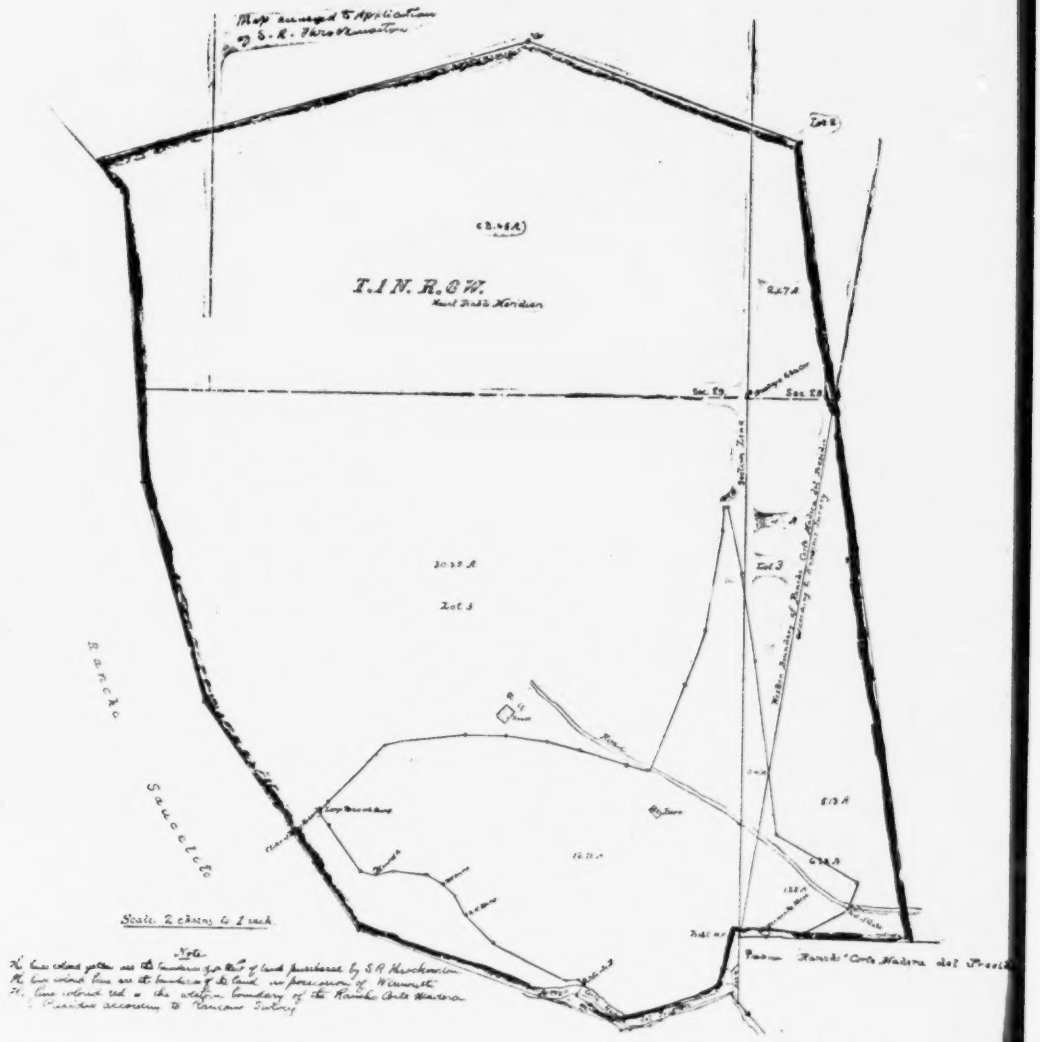
TRANSCRIPT OF TESTIMONY AND PROCEEDINGS IN GENERAL LAND DEPARTMENT.

Defendants counsel then offered and read in evidence the certified copy of all of the testimony and proceedings in the General Land Office in the matter of the contested case of S. R. Throckmorton against Ebenezer Wormouth, which are in substance as follows:

To the Register and Receiver of the United States Land Office at San Francisco, California, and to the Honorable Commisioner of the General Land Office, Washington, D. C.

16877

47 A


Map accompanying Application of S. R. Thurston
T. 1 N. R. 6 W.
Zot 8
Zot 7
Zot 4
Zot 3
Zot 5
Sec. 29
Sec. 28
Section Lines
Waiakea Boundary of Royal Grants
Waiakea Grant
Waiakea Grant
Waiakea Grant

Now comes SAMUEL R. THROCKMORTON, a native-born citizen of the United States, over the age of twenty-one years, residing in the City and County of San Francisco, State of California, and respectfully shows that he is a purchaser of a portion of the Rancho Corte Madera del Presidio in Marin County, State of California, granted to Juan Reed by the Mexican Government, and confirmed by the United States District Court for the Northern District of California, surveyed by the United States Surveyor General for California, and the survey, so far as the western line of said Rancho Corte Madera del Presidio is concerned, duly approved by the Honorable Secretary of the Interior, by his decision dated May 3rd, 1880, and hereby applies to purchase under the seventh section of the Act of Congress approved July 23rd, 1866; that portion of the Rancho Corte Madera del Presidio, excluded from the final survey of said Rancho, situate, lying and being in sections 28 and 29, township 1 north, range 6 west, Mount Diablo meridian, containing seventy-three and 86-100 (73.86) acres, as shown by the accompanying survey of said tract so ex-
55 cluded, made by G. F. Allardt, Deputy United States Surveyor for the State of California, and in support of his application to purchase herewith files his affidavit, together with certified copies of the deeds of conveyance from the several parties from whom he deraigned title, viz. deed from John J. Reed et al. to James C. Bolton, dated August 12, 1865; deed from James C. Bolton to Rodolph Steinbach, dated September 16, 1865; deed from Rodolph Steinbach to Emil Steinbach, dated March 28, 1866; power of attorney from Emil Steinbach to Rodolph Steinbach, dated February 18, 1864; deed from Emil Steinbach to Emil Grisar, dated June 16, 1866; deed from Emil Grisar to S. R. Throckmorton, dated June 19, 1866; deed from J. C. Bolton to Thos. B. Valentine, dated July 25, 1868; deed from John J. Reed to Hugh A. Boyle, dated May 11, 1869; deed from Hilarita Reed to Hugh A. Boyle, dated May 24, 1869; deed from Thos. B. Deffebach et al. to Julius C. McCeney, dated February 1, 1871; deed from Julius C. McCeney to S. R. Throckmorton, dated January 19, 1875.

The tract sought to be purchased was excluded from the final survey aforesaid, and is now in the possession of your petitioner, and he asks that he be permitted to purchase same as provided in the seventh section of the Act of Congress approved July 23, 1866.

That the land sought to be purchased by applicant is included and embraced within the exterior boundaries of the

Rancho Corte Madera del Presidio, granted to Juan Reed by the Mexican Government and confirmed to his heirs by the United States.

S. R. THROCKMORTON.

San Francisco, October 20th, 1880.

State of California,

City and County of San Francisco—ss:

SAMUEL R. THROCKMORTON, being first duly sworn, upon his oath deposes and says. That he is a native-born citizen of the United States, over the age of 21 years; is a resident of the City and County of San Francisco, State of Cali-
56 fornia, that he has acquired by purchase from the heirs of Juan Reed, the original Mexican grantee of the Rancho Corte Madera del Presidio, for a valuable consideration, that certain piece or parcel of land in Marin County, State of California, situate in sections 28 and 29, township 1 north, range 6 west, Mount Diablo meridian, containing eighty and 24-100 acres, being a portion of the Rancho Corte Madera del Presidio, granted by the Mexican Government to Juan Reed, and confirmed to the heirs of said Reed by the United States District Court for the Northern District of California; that said rancho has been surveyed by the United States Surveyor General for California, and the western line thereof duly approved by the Honorable Secretary of the Interior, in his decision dated May 3rd, 1880; that by said survey and decision the western line of said rancho has become established and approved; that 73 and 86-100 acres of the land purchased by affiant from the heirs of Juan Reed, Mexican grantees or their assigns, has been excluded from the final survey of said rancho; that said tract of land so excluded is embraced within the exterior boundaries of the Rancho Corte Madera del Presidio, confirmed to the heirs of Juan Reed, and forms a part thereof; that affiant, ever since June 19, 1866, has been in the actual, quiet and peaceable possession of said tract of land, according to the lines of the original grant and deed of conveyance to him, and has used and improved the same, save and except that portion described in the field notes—(marked Exhibit "A")—attached hereto and made a part hereof, which is not in his possession, but it is also sought to be purchased by him; that a portion of the land, viz: 6 and 38-100 acres, so purchased, is included in the survey of the Rancho Corte Madera del Presidio; that a survey of said tract of land excluded from the final survey of said rancho and sought to be pur-

chased by affiant has been made by G. F. Allardt, Deputy United States Surveyor, and the field notes thereof are filed herewith and made a part hereof—marked Exhibit "B"—that there are no valid adverse rights or titles to said tract of land to his knowledge; that the government lands in town-
57 ship 1 north, range 6 west, Mount Diablo meridian, have been surveyed, and by order of the Honorable Commisioner of the General Land Office, the official plat of survey was filed in the United States Land Office at San Francisco, California, on the 2nd day of August, 1880; that this is the first opportunity affiant has had to present his claim for the land excluded from the final survey of said rancho, and he now applies to purchase the same as provided by the seventh section of the Act of Congress, approved July 23, 1866; that to the best of affiant's knowledge and belief the lands sought to be purchased contain no mines of gold, silver, copper or cinnabar; that the tracts of land sought to be purchased are designated on the official plat of township 1 north, range 6 west, Mount Diablo meridian, as lot No. 3 of section 28, containing 3 and 16-100 acres; part of lot 2, section 28, containing 2 and 27-100 acres; part of northeast quarter of section 29, containing 22 and 16-100 acres; part of lot 2, section 29, containing 2 and 87-100 acres, and the whole of lot 3, section 29, containing 43 and 10-100 acres, making a total of 73 and 86-100 acres; that the land purchased as aforesaid is enclosed by a good, substantial enclosure; that the land not in possession of affiant, viz: 14 and 61-100 acres, is within his said enclosure, and a suit in ejectment is now pending, wherein affiant seeks to recover the possession of the same.

S. R. THROCKMORTON.

Subscribed and sworn to before me this 20th day of October, 1880.

J. A. ROBINSON,
United States Commissioner.

Exhibit A—Tract excepted—Beginning at a post marked "C. M. P. 181" from which a madrona tree 4 feet diam. marked "B. T. C. M. P. 181" bears S. 24 E. 87 links distant; thence according to the true meridian the magnetic variation being 16 degrees 30 minutes east, as follows:

1. East 1.00 to E. Wormouth's house (the line cuts off the southeast corner of the house), 2.12 to Wormouth's
58 fence; thence along this fence as follows:

2. N. 60 E. 2.23 to south part of a gate across road; course of road E. and W.

3. N. 15½ E. 1.11 to angle in fence.

4. N. 60 W. 3.53 to angle in fence, the road continues N. 60 W.

5. N. 8. W. 6.50 to angle in fence.

6. N. 9. W. 3.40 " "

7. N. 14½ W. 2.58 " "

8. West 0.10 " "

9. S. 8. W. 0.34 " "

10. S. 0.½ W. 0.50 " "

11. S. 9.¾ W. 3.77 " "

12. S. 18.½ W. 2.22 to angle in fence from which the north end of a barn bears S. 12.½ W.

13. S. 21.¾ W. 3.48 to angle in fence on south side of said road, the north end of barn bears S. 12 degrees E. 1.31 chains distant.

14. N. 71 W. 0.88 to angle in fence, the road now turns to the right.

15. N. 75.½ W. 1.83 to angle in fence.

16. N. 72.¾ W. 1.22 " "

17. N. 84.½ W. 1.50 to angle in fence, the nearest corner of a house bears north 44 links distant.

18. N. 88 W. 159 to angle in fence.

19. S. 83.¼ W. 2.40 " "

20. S. 74 W. " "

21. S. 47 W. 0.44 " "

22. S. 44 W. 2.56 " "

23. S. 40.½ W. 0.48 to an angle in fence in cluster of young redwood trees at 40 links on this course a large redwood stump is four links to the left.

24. S. 32 E. 0.64 to an angle in fence.

25. S. 35.½ E. 2.02 to an angle in fence.

26. S. 77 E. 0.65 to a laurel 8 inches diam. in a cluster which I marked "A" standing near the north bank of the Arroya Corte Madera del Presidio.

59 27. N. 71 E. 0.72 to angle in fence.

28. S. 83.½ E 1.23 to angle in fence near arroya.

29. S. 61 E. 0.75 to angle in fence on south edge of a large redwood stump.

30. S. 47 E. 0.61 to angle in fence.

31. S. 30 E. 0.85 to large redwood stump in cluster of young redwoods at angle in fence.

32. S. 47 E. 1.41 to angle in fence.
33. S. 65 E. 3.19 " "
34. N. 83 E. 0.33 " "
35. S. 50 E. 0.23 to a sixforked maple on the north bank of said arroya, which I marked "B" cross arroya.
36. S. 15 W. 0.45 to angle of fence on south bank of said arroya.
37. S. 63 E. 0.63 to an angle in fence.
38. S. 48 E. 0.90 " "
39. S. 57 E. 0.55 " "
40. N. 84.½ E. 1.00 " "
41. N. 63 E. 0.50 " "
42. N. 63 E. 0.47 " "
43. N. 70 E. 1.10 " "
44. N. 65.¼ E. 1.39 to an angle in fence, thence along fence and re-said arroya.
45. N. 60 E. 0.25 to point in the 180th course of the Matthewson survey of the Rancho Corte Madera del Presidio; thence along said 180th course.
47. North 1.22 to post C. M. P. 181, the place of beginning, containing 14 and 65-100 acres.

G. F. ALLARDT,
Surveyor.

Exhibit B—Field notes of a tract of land situated in Marin County, California, and surveyed for Samuel R. Throckmorton, Esq., by G. F. Allardt, Surveyor. Magnetic variation 16 degrees 20 minutes east.

Beginning at a post marked C. M. P. 181, distant 20 chains north of corner sections 28, 29, 32, 2, 33, T. 1 N., R. 6 W.,
60 from which a madrona 4 feet diameter marked B. T. C. M. P. 181 bears S. 24 E. 87 links distant. (This post is station No. 181 of R. C. Matthewson's survey of the Rancho Corte Madera del Presidio); thence along the line of said Matthewson's survey:

1. East 1.00 Wormouth's house is 5 links to left, 2.10 cross fence course N. 60 E. 6.38 to station set a post in mound of stone from which an oak 22 inches diameter bears N. 17.½ W. 3.33 chains and said madrona bears S. 82.½ W.; thence leaving said survey and over slightly rolling ground.

2. N. 9 W. 1.00 cross fence, course E. and W. 1.20 cross road, course E. and W. and enter ploughed field 15.36 cross fence, course N. 71 W. S. 71 E. and leave field; 15.58 cross dry

ravine, course S. 70 E. 29.90 to station. Set a post and descend.

3. N. 70.¾ W. 2.10 cross same ravine, course southerly and ascend steep slope; 10.70 to station on top of grassy spur. Set a post marked "A" and descend.

4. S. 73.¾ W. 8.50 to foot of steep slope opposite corner of field 14.20 cross fence and bars, course N. 15 W. 16.50 to redwood stump 27 inches diameter (which I marked W.) on left bank of the Arroyo Principal de Corte Madera del Presidio; 16.65 to station in center of creek; thence down the center of said creek with the meanders thereof, according to Wm. J. Lewis' survey of the Rancho Saucelito.

5. S. 39.¾ E. 1.50 to station S. 11 of said Lewis' survey.

6. S. 4.½ E. 10.74 to station S. 12 of said Lewis' survey.

7. S. 17 E. 8.50 to station S. 13 of said Lewis' survey.

8. S. .35 E. 10.30 to station S. 14 of said Lewis' survey (at 5 chains to junction of right branch of said arroyo, bears west).

9. S. 71.¼ E. 10.78 to station S. 15 of said Lewis' survey.

10. N. 70.¼ E. 3.90 to station S. 16 of said Lewis' survey.

11. S. 33.¾ E. 0.40 to station in center of said arroyo and on line between sections 28 and 29, T. 1 N., R. 6 W., 17.55 chains north of corner sections 28, 29, 32 and 33; thence leaving said creek and survey.

12. North 2.45 to the post C. M. P. 181, the place of
61 beginning. Containing 80 and 24-100 acres.

G. F. ALLARDT,
Surveyor.

UNITED STATES LAND OFFICE,

San Francisco Cal., December 11, 1896.

I hereby certify that the annexed is a full, true and correct copy of application of S. R. Throckmorton to purchase portions of sections 28 and 29, township 1 north, range 6 west, M. D. M., now on file in this office.

JOHN P. DUNN,
Register.

UNITED STATES LAND OFFICE,

San Francisco, Cal., February 7, 1881.

S. R. Throckmorton	J. A. Robinson Esq., Attorney.
vs.	Jas. F. Stuart Esq.
Ebenezer Wormouth	Attorney.

S. R. Throckmorton on October 20, 1880, made application to purchase, under seventh section Act of July 23, 1866, lot 2, section 28, and lots 2 and 3 and S. E. ¼ of N. E. ¼, section 29, T. 1 N., R. 6 W., M. D. M.

Ebenezer Wormouth filed D. S. 10,661 December 18, 1874, alleging settlement March 1, 1859, for lot 3, section 28, and lot 3, section 29, same township and range.

Said filing was decided to be premature and illegal by letter of Hon. Comr., G. L. O., of Aug. 31, 1880, "G" in case of R. S. Brown.

Said Wormouth on Sept. 14, 1880, filed D. S. 15517, alleging settlement March 5, 1859, claiming the same land as in
62 his previous filing.

On May 20, 1881, said Wormouth made H. E. No. 4415 upon the same land.

Township plat filed Dec. 5, 1874.

Sections 16, 17, 20, 21, 28 and 29 suspended March 1, 1875. Suspension removed except as to lots 2 and 3, section 28, and lots 2 and 3 and S. E. ¼ of N. E. ¼, section 29, August, 1875, by letter of Surv'r Gen'l for Cal. of Aug. 7, 1875.

Plat withdrawn from office Aug. 13, 1875, and returned and filed in this office Aug. 2, 1880.

WM. R. WHEATON,
Register.
CHAS. H. CHAMBERLAIN,
Receiver.

Exhibit A.

In the
United States Land Office,
For the San Francisco District,
San Francisco, Cal.

The People of the United States to Mrs. H. R. Cushing and E. Wormouth—Greeting:

You are hereby summoned to appear before us at our office in the City of San Francisco on Monday, the 7 day of Feb'y,

A. D. 1881, at 9 o'clock a. m. to contest the claim of S. R. Throckmorton, averring your claim to the lots 2 and 3, section 28, and lots 2 and 3 and S. E. ¼ of N. E. quarter of section No. 29, township 1 N. of range 6 W. M. D. M. to be unjust and illegal and then and there do you show cause, if any there be, why the claim of said S. R. Throckmorton shall not be recognized as just and legal, and he be allowed to enter the said land.

Given under our hands this 15 day of Dec., A. D. 1880.

WM. R. WHEATON,
Register.
CHARLES. H. CHAMBERLAIN,
Receiver.

Service of a copy of the within summons ackuowl-
63 edged this 31 day of Dec., 1880.

E. WORMOUTH,
H. R. CUSHING.

Witness.

JACOB GARDNER.
509 Montgomery street, rooms 3 and 4.

San Francisco, Feb'y 5th. 1881.

Register and Receiver,
U. S. Land Office, San Francisco, Cal.

Stipulated: That the case of Throckmorton vs. Cushing and Wormouth—after opening the case on Monday by taking the testimony of S. R. Throckmorton, may be continued to suit the convenience of Land Office for a period of three weeks, and upon due notice being given by the attorneys.

J. A. ROBINSON,
Attorney for S. R. Throckmorton.
JAMES F. STUART,
Attorney for E. Wormouth.

Before U. S. Land Office,
San Francisco.

In the matter of the application of Samuel R. Throckmorton to purchase a portion of sections 28 and 29, township 1 north, range 6 west, M. D. B. and M.

Deposition of Samuel R. Throckmorton.

Before the United States Land Office, San Francisco, Cali-

fornia. In the matter of the application of Samuel R. Throckmorton, to purchase (under the Act of Congress entitled "An Act to Quiet Land Titles in California," approved July 23, 1866), a portion of sections 28 and 29 in township 1 north, range 6 west, Mount Diablo base and meridian, de-
64 scribed as lot 2 of section 28, containing 2.27 acres, lot 3 of section 28, containing 3.16 acres, a portion of the east half of the northeast quarter of section 29, containing 22.46 acres, lot 1 of section 29, containing 2.37 acres, lot 30, section 29, containing 43.10 acres, making a total of 73.86 acres.

Monday, February 7, 1881.

Present:

J. A. Robinson,
Representing Samuel R. Throckmorton;
James F. Stuart,
Representing Ebenezer Wormouth.

Mr. Stuart, on behalf of Ebenezer Wormouth, objects to any testimony taken in this matter under the Act of Congress entitled "An Act to Quiet Land Titles in California," approved July 23, 1866, upon the ground that the said act has been repealed as appears by the Revised Statutes of the United States.

Mr. Robinson, on behalf of applicant, offers in evidence application of S. R. Throckmorton in this matter on file in the United States Land Office at San Francisco.

Also summons issued December 15, 1880, signed by the Register and Receiver of the United States Land Office at San Francisco, addressed to Mrs. H. R. Cushing and E. Wormouth, together with an admission of service signed by each of the said parties, endorsed thereon, marked "Exhibit A."

Also, the entire Act of Congress of July 23, 1866, under which this proceeding is had.

Also, the original field notes of a survey of the land sought to be purchased by this applicant made by G. F. Allardt, Deputy United States Surveyor, marked "Exhibit B."

Also, a map accompanying the field notes exhibit B, marked Exhibit "C."

Also, a certified copy of the petition of Juan Reed to the Mexican Government for a grant of the Rancho Corte Madera del Presidio, marked "Exhibit D."

Also, certified copy of the grant and juridical posses-
65 sion of the Rancho Corte Madera del Presidio, marked "Exhibit E."

Also, certified copy of the decree of the Board of Land Commissioners in the case number 497, confirming to the heirs of Juan Reed the Rancho Corte Madera del Presidio, marked "Exhibit F."

Ex. G. Also, certified copy of the decree of confirmation by the United States District Court for the Northern District of California, in the case number 183, confirming to the heirs of Juan Reed the Rancho Corte Madera del Presidio, marked "Exhibit G."

Ex. H. Also, certified copy of deed from John J. Reed, Hilarita M. Reed, Thomas B. Deffenbach and Inez Deffenbach to James C. Bolton, dated August 12, 1865, recorded in book E of deeds, page 400, Marin County Records, marked "Exhibit H."

Ex. J. Also, certified copy of deed from James Clinton Bolton to Rudolph Steinbach, dated September 16, 1865, and recorded in book E of deeds, page 417, Marin County Records, marked "Exhibit J."

Ex. K. Also, certified copy of deed from Rudolph Steinbach to Emil Steinbach, dated March 28, 1866, and recorded in book E of deeds, page 569, Records of Marin County, marked "Exhibit K."

Ex. L. Also, certified copy of powers of attorney from Emil Steinbach to Rudolph Steinbach, dated February 18, 1864, recorded in book B of Powers of Attorney, page 163, Marin County Records, marked "Exhibit L."

Ex. M. Also, certified copy of deed from Emil Steinbach to Emil Grisar, dated June 16, 1866, recorded in book F of deeds, page 279, Records of Marin County, marked "Exhibit M."

Ex. N. Also, certified copy of deed from Emil Grisar to S. R. Throckmorton, dated June 19, 1866, recorded in book F of deeds, page 278, Marin County Records, marked "Exhibit N."

Ex. O. Also, certified copy of deed from James Clinton Bolton to Thomas B. Valentine, dated July 26, 1868, and recorded in book G of deeds, pages 116 and 117, Marin
66 County Records, marked "Exhibit O."

Ex. P. Also, certified copy of deed from John J. Reed to Hugh A. Boyle, dated May 11, 1869, recorded in book J of deeds, pages 9 and 10, Marin County Records, marked "Exhibit P."

Ex. Q. Also, certified copy of deed from Hilarita Reed to Hugh A. Boyle, dated May 24, 1869, recorded in book J of deeds, pages 11 and 12, Marin County Records, marked "Exhibit Q."

Ex. R. Also, certified copy of deed from Thomas B. Deffenbach and Inez Reed Deffenbach, Hugh A. Boyle, Maria Garcia de Boyle, Thomas B. Valentine and H. C. Newhall to Julius C. McCeney, dated February 1, 1871, recorded in liber J of deeds, pages 24-25, Marin County Records, marked "Exhibit R."

Ex. S. Also, certified copy of deed from Julius C. McCeney to Samuel R. Throckmorton, dated January 19, 1875, recorded in book I of deeds, pages 266-268, Records of Marin County, marked "Exhibit S."

Ex. T. Also, original plat and field notes of survey made by G. F. Allardt of the tract of land application to purchase which is now made, said survey having been made January 7, 1871, recorded February 6, 1871, in liber J of deeds, pages 30-32, Marin County Records, marked "Exhibit T."

Counsel for the applicant reserves the right to withdraw the said original plat and field notes, Exhibit T, by substituting in lieu thereof a certified copy.

Examination-in-Chief of Samuel R. Throckmorton. (Sworn on behalf of applicant.) By Mr. Robinson.

My name is Samuel R. Throckmorton, I am seventy-two years of age, my place of residence is San Francisco, California, and I am a land-holder. I have resided in California since June, 1850. I do know the land described by said map marked Exhibit "C." I have known it since 1855. The tract is enclosed.

Q. We will start with the line of fence along the creek designated upon said map as Arroyo Principal de Corte Madera del Presidio, and I will ask you when that fence
67 was built and by whom, if you know?

A. Commencing at Station 15 there has been a fence along there which could have been built within my knowledge since 1857,-and it antedates that, by common report. It is a post and rail fence. It has been built and rebuilt and replaced as it went out of repair from time to time, and it extended, as shown on the map Exhibit "C" until it joins the Corte Madera del Presidio creek running parallel with it, extending up to, I should say, as far as a point opposite the word "Arroyo" on the map. I reserve the right to correct this statement as to the termination of that fence upon reference to field notes which I have not now at hand. That far it was an ancient fence and has been standing there, to my knowledge, since 1857, when I first saw it, and it was frequently repaired after that time. It is in good condition now. It has been repaired frequently and a good deal of it rebuilt. Beyond that, extending

to the northwest corner where Baratra's house is, the fence was extended from this ancient fence in the winter of 1866-7. It was a substantial, first-class, post and rail fence when it was built. All of this western line of fence has been kept in repair, the first-mentioned part since 1857, and the part last mentioned since 1866-7, and some of it has been rebuilt in the best possible manner within the last three or four years, and is now in good order. Starting on the northwest corner of said map and running over to the point marked on the map, "Post A.", on top of of "grassy spur," there is a first-class fence built by me in the year 1872, I think. That line is intended to mark the northwestern line of the tract. I built the same kind of a fence at the same time from that post marked A. referred to, running over the line which runs north 70.¾ degrees west 10.70 chains. That lines marks the northeastern boundary. Upon the northeast corner of the tract is the point marked "Pest" at the end of the line referred to.

Q. Commencing at that post and running southerly to the point marked "Post in Stone Mound," is there a fence along that line?

A. There is a fence extending along that line to
68 within a few feet of the post last referred to, where the fencing of that line merges, for convenience, into a lane, enclosed by a gate. That fence was built by me at the same time as the fence last mentioned, and was a fence of the same character as the other. From the point where that fence strikes the lane it runs west along the fence of said lane to the gate and thence by a diagonal short fence to the southwest, until it intersects the boundary line of the tract on the south, running between the before mentioned in stone mound to the post marked on the map "Post C. M. P. 181." Thence there is a fence running south 2.45 chains, and thence there is a fence running northeasterly 40 links, and thence a fence running along the line marked on the map north 70.1-4 degrees east 3.90 chains to station 15, the point of commencement of the old fence first referred to in this description. I built the the other. It has been changed and altered a little and repaired to suit convenience in reference to the gate, I believe, once or twice. The entire tract is to-day enclosed by a substantial fence on these courses and distances about the time I finished fence, and has been ever since 1872, and every part has been fully enclosed; and the western line, as I said, has been enclosed from time immemorial, almost—that is, ever since I have known it, for the distance that I have described. I gain

access to the tract by going over in some part land that I am not in possession of. There are gates and bars that give access to it from three ways, and one gate from my own land and one set of bars over that which I possess in this tract.

Q. I will ask you if the fence on the west of the tract described is on the boundary of the Rancho Corte Madera
69 del Presidio, as granted by the Mexican Government to Juan Reed and confirmed to the heirs of Juan Reed?

A. No, it is not. The old fence referred to is on the northeastern line of land of which I have always been in possession and which is shown on the map marked "A long fence." The Rancho Corte Madera del Presidio is bounded by Corte Madera del Presidio Creek in the grant on the west. This tract is within the interior boundaries of the Corte Madera del Presidio grant. The Corte Madera del Presidio Creek comprises the western boundary at the place referred to. I do not possess all of the tract enclosed by the fence described. I am in possession of that which the map Exhibit C shows that I am in possession of. The lands within the inner lines of the tract shown on the map are in possession of Ebenezer Wermouth, and have been for many years. I have never been in possession of that portion of the land. Wermouth is in possession of 14 acres, consisting of two pieces, one containing 12.¾ acres and the other 1.¼ acres as described on the map within the inner lines with courses and distances. I claim this tract of land last referred to, now in possession of Wermouth, as part of the Rancho Corte Madera del Presidio by virtue of my deed. Wermouth has been in possession of part of that tract of land of 14 acres for many years, but my recollection does not serve me as to his occupation of the different pieces of it. I think he added to his possession at different times. I have used and improved the land enclosed within the exterior boundaries of the whole tract, as shown on the map Exhibit C, excepting the tract of 14 acres referred to, claimed by Wermouth. I have used and occupied all that part lying west of the westerly fence of this tract first spoken of, and described in my answer to Q. 7 in this deposition, since 1855; I have been in possession of the rest, as tenant in common with the Reeds and Bolton, since June 19, 1866; and I have improved and occupied it exclusively since 1872, the time of putting a fence around it, with improvements. I have used it for ranch purposes. It is being used now by my tenant John Baratra. On the 19th day
of June, 1866, I purchased this land from Rudolph
70 Steinbach by deed from Emil Grisar, in whom the

legal title then was, one undivided quarter of all of the Rancho Corte Madera del Presidio outside of the Matthewson survey, as described in the deed from the Reeds to Bolton. The consideration which I paid Steinbach was $1250.00, and $250.00 of his legal expenses, making $1500.00 in all which I paid for the one-quarter. I entered into possession with them as a tenant in common. I made that purchase pending a suit in ejectment brought by the Reed heirs, in the complaint filed in which case they claimed, as a part of the Rancho Corte Madera del Presidio, the land for which I now petition; and in their deed to Bolton, in which they made the title to the quarter which I purchased, they described it as a part of the Rancho Corte Madera del Presidio. They had partially tried their case and, I think, taken testimony, sustaining by their proofs the allegation that this land was within the exterior boundaries of the Rancho Corte Madera del Presidio. In that condition of assertion of ownership, by them, I purchased one-quarter of the Bolton interest before mentioned, the land outside of the Matthewson survey which included this tract in question. It was the case of James C. Bolton vs. John Van Reynegan et al., number 199 in the United States Circuit Court. In that suit a tenant of my own, living on the Saucelito Rancho had been made a party, whom I defended. In the course of events Bolton and Van Reynegan and the Reed heirs withdrew so much of their pretentions as included my tenant, which left, that is, the Reeds, Bolton and myself, as owners and tenants in common before named of the one-quarter of the Corte Madera del Presidio Rancho within its original described boundaries. Then they amended their complaint, and took judgment against such of the settlers as were on the parts of their land which they claimed to be within their own boundaries, which resulted in obtaining judgment in accordance with their amended complaint. Then on February 1st, 1871, the Reeds, Bolton and myself, owners of that interest, made amicable partition, setting apart my interest in it, the deed of
71 which was made to the name of one Julius C. McCeney, for the reason and purpose of avoiding confusion which might be produced by so many cross-conveyances as we were making at this time in clearing this matter up; but it was given to him and taken by him for my account, and the interest has since been conveyed by him to me by deed dated January 19th, 1875. At the time of the execution of the deed to McCeney for my use

I deeded to my co-owners and their representatives the balance of all the interest that I claimed under the deed from Grisar to me. The $1250.00, together with $250.00 attorney's fees, expressed in the deed from Grisar to me, is really the consideration which I paid for the land. I do not wish to make any further statement with reference to this chain of title. I do not think the Rancho Corte Madera del Presidio has ever been surveyed at all by the United States authorities as a rancho; I don't think there ever has been a legal survey made of the rancho. Dr. Matthewson surveyed a piece of it off in 1858, but I think the survey was set aside. This survey did not touch me anywhere. The next survey was made by Leander Ransom; it was not made by anybody, to tell the truth. These surveys were merely re-capitulations and illustrations of former surveys made by the State of California for other purposes. There never was a United States survey made around the land, except on one line, and that was the western line which, by some inscrutable accident, was confirmed by the Secretary of the Interior. The Rancho Corte Madera del Presidio has not been patented and there has been no re-survey made under the last orders of the Land Department, and notwithstanding that, a map of public land has been promulgated and put on file in the Land Office, and entries have been made under it, whilst there never has been a re-survey made; and it is in consequence of that irregularity that I make this application to save my rights.

Q. What is the western boundary of the Rancho Corte Madera del Presidio, as described in the grant, judicial
72 possession, decree of the Board of Land Commissioners, and decree of the United States District Court?

Obj. Mr. Stuart—We object to that as incompetent, because the records in relation to the matters are the only evidence that can be used; parole evidence cannot be brought in to vary or contradict or in any way alter the record proofs.

A. As described in the judicial possession the boundary on the west is a little brook now called the Arroyo Corte Madera del Presidio, and willow thickets and the little foothills running up to the mountain called the Palmos, and which western boundary extends northerly to the southerly boundary line of the Pueblo of San Rafael to another little brook called the Jolon and another Corte Madera, called Corte Madera del San Pablo, which northern boundary of necessity must carry the boundary line up to the head junction of the two creeks where they deflect from each other. I describe this western bound-

ary as being the entire length of the little brook, the willows and foothills, and so forth, because the western boundary must extend that far up or you could not meet the northern boundary. The northern boundary is the whole course of the Arroyo Jolon from where it heads at the head of the little brook, the western boundary, out to the Bay of San Francisco, and which northern boundary so described is more than a measured mile north of the northern boundary of the tract claimed by this applicant. The tract of land sought to be purchased by me in this proceeding is included within the exterior boundaries of the land granted to Juan Reed and conformed to his heirs; and the tract which I wish to purchase is included within the boundaries of the land granted by the Mexican Government to Juan Reed, named the Rancho Corte Madera del Presidio. I brought a suit of ejectment in the Seventh District Court, in and for Marin County, and which is still pending, against Wermouth to eject him from the piece of land in his possession included in the survey represented on the map Exhibit C. The record shows that Wermouth was one of the defendants dispossessed by the United States Marshal in the case of Bolton vs. Van Reynegan referred to.

73 I never heard, or even the suggestion of it, that the land sought to be purchased by me in this application contains any mines of gold, silver, copper or cinnabar.

Ex. U. Mr. Robinson, on behalf of applicant, offers in evidence certified copy of the complaint in the case of James C. Bolton vs. John Van Reynegan, in the United States Circuit Court for the District of California, number 190, marked "Exhibit U."

Ex. V. Also certified copy of the judgment in the said action, marked Exhibit V.

Ex. X. Also certified copy of the complaint in the case of Samuel R. Throckmorton vs. Ebenezer Wermouth, in the District Court of the Seventh Judicial District of the State of California, in and for the County of Marin, together with a certificate that the said suit is still pending, marked Exhibit X.

Ex. W. Also a certified copy of the writ of possession and return of the United States Marshal in the case of James C. Bolton vs. John Van Reynegan, marked Exhibit W.

Cross-examination of Samuel Throckmorton by Mr. Stuart. The writ of possession in the suit of Bolton vs. Van Reynegan under which these parties were dispossessed, did include a little of the land that Wermouth now claims, and that is in contest between him and me in this matter. He was dis-

possessed under that judgment of any of the land that he is now claiming in this proceeding. I don't think he was put out of all that he is now claiming; I don't know exactly the quantity of which he was dispossessed, because I was not there. My impresson is that the writ of possession dispossessed him of that portion of the land claimed by him that is included in the description in the amended complaint in that suit. I do not know whether the land claimed by him in this contest was the land that Wermouth was ejected from by the United States Marshal, the record will show. The land from which Wermouth was ejected in the suit referred to is a part and portion of the land purchased by me as I have stated, and apportioned or partitioned to me by my co-tenants, and I claim,
and assert title to it under that purchase, and in no
74 other way.

Upon reading the above deposition, the witness makes the following corrections:

I wish to correct my testimony by stating that the old fence referred to on the western boundary of the tract terminated near station 13, as delineated upon map Exhibit C.

I wish to add: That part of the land lying west of the old fence referred to is enclosed by the fence of my Rancho Saucelito, which adjoins this property.

S. R. THROCKMORTON.

Subscribed and sworn to before me, this 7th day of Feb'ry, 1881.

CHAS. H. CHAMBERLAIN,
Receiver.

Tuesday, April 5, 1881.

Case called on this day by agreement of counsel for S. R. Throckmorton and E. Wermouth, according to the stipulation on file herein. Present J. A. Robinson Esq., Counsel for Throckmorton, and E. Wermouth in person and by Counsel J. F. Stuart Esq.

Counsel for E. Wermouth objects to the taking of any testimony at this time, because the survey of the Rancho Corte Madera del Presidio is a pending case now before the Land Dept. of the Govt. and the survey and location of said ranch has never been finally made and therefore the Tp. Plat filed in this case upon which S. R. Throckmorton has acted in filing his claim, has been illegally filed and no legal right exists in said Throckmorton to prosecute this suit against Wermouth

until the said ranch shall have been finally surveyed and a patent issued on said survey, and until an official map of said township shall have been legally filed after the officiai survey of said ranch and the issuing of the patent therefor.

Counsel for S. R. Throckmorton replies that at a hearing duly had in this case on the 7th day of Feb'y, 1881, the testimony of S. R. Throckmorton the applicant was duly
75 taken, at which examination J. T. Stuart, Esq., Attorney for E. Wermouth, was present and cross-questioned said witness S. R. Throckmorton, and that a number of exhibits were introduced on behalf of S. R. Throckmorton.

Jacob Gardner called and sworn on behalf of S. R. Throckmorton, testifies as follows:

By Mr. Robinson.

My age is 35 years old, I reside on the Saucelito Rancho, Marin County, and am superintendent of said rancho. I know the land delineated by a brown line upon the map attached to the application of S. R. Throckmorton in this case as being part of Tp. 1 N., R. 6 W., M. D. M. I also know the tract shown upon said map and colored blue. The tract colored brown, with the exception of the tract colored blue, is in the possession of S. R. Throckmorton, since 1871 or 1872, I think 1871. The same is used for grazing by Mr. Borarta, who leases it from Mr. S. R. Throckmorton. It does not contain any mines of gold, silver, copper or cinnabar to my knowledge. It is enclosed with a board and picket fence built by Mr. S. R. Throckmorton, all but the blue line that was built before I came. I have known the fences on the line colored brown since 1871 or 1872. There was a fence on the line colored brown commencing at the N. W. corner of the tract included in the brown lines and running northeasterly about 400 feet, perhaps more. There was no other fencing along the north and east line colored brown. There was a fence commencing on the Arroyo Corte Madera del Presidio, southeast of the point marked on the map Wermouth's house and running along the line colored brown up to the N. W. corner. Mr. E. Wermouth, contestant herein, occupies the land included in the blue lines. He has been in possession since I have known the land.

Cross-examination of this witness waived by Mr. Stuart.

JACOB GARDNER.

Subscribed and sworn to before me this 5th day of April, 1881.

WM. R. WHEATON,
Register.

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John Boratra called and sworn on behalf of S. R. Throckmorton testifies as follows:

By Mr. Robinson.

My age is 41 years old, I reside on the Saucelito Rancho, Marin County, and am a dairyman. I know the land shown upon said map by a line colored brown, attached to application of S. R. Throckmorton, but I do not understand the map thoroughly. I occupy the tract colored brown with the exception of the tract colored blue, as the tenant of Mr. Throckmorton. I have occupied the entire tract since it was fenced, I think in 1872, and a portion of it before that. The same was used for grazing purposes during all those years. As the tenant of S. R. Throckmorton, I went to live in that locality in the fall of 1866 to the best of my memory. The said tract is colored brown. There was a portion enclosed when I first went there where a fence along the creek, Arroyo Corte Madera del Presidio, commences just south of Wermouth's house and running up to the N. W. corner of the tract, up to lands now occupied by Mrs. Cushing, and from that N. W. corner there was a piece of fence extending easterly along the line for about 2.5 of the distance to the next corner east. There were no other fences on the north and east line when I went there, but the tract was all enclosed in 1872. The fence is a good 4-board fence on the north and east line and on the creek a portion is a picket and a portion post and rail, these fences on the north and east line were built by me for Mr.Throckmorton and I have kept the other fences in repair. This land does not contain any mines of gold, silver, copper or cinnabar; not that I know of.

Cross Exam. by Mr. Stuart. Jacob Gardner, the witness who preceded me, was Mr. Throckmorton's agent at the time the fence spoken of by you was built by me.

JOHN BORATRA.

Subscribed and sworn to before me this 5th day of April, 1886.

WM. R. WHEATON,

77 Register.

Continued--To be called on consent and by agreement of counsel. U. S. Land Office, San Francisco, Cal. In the matter of the application of Throckmorton to purchase portions of sections 28 and 29, T. 1 N., R. 6 W., M. D. M. Deposition of Allardt. Before the United States Land Office, San Francisco, California. In the matter of the application of

Samuel R. Throckmorton to purchase (under the Act of Congress entitled "An Act to Quiet Land Titles in California," approved July 23, 1866) a portion of sections 28 and 29, in township 1 north, range 6 west, Mount Diablo Base and Meridian, described as lot 2 of section 28, containing 2.27 acres, lot 3 of section 28, containing 3.16 acres, a portion of the east half of the northeast quarter of section 29, containing 22.46 acres, lot 1 of section 29, containing 2.87 acres, lot 3 of section 29, containing 43.10 acres, making a total of 73.86 acres.

Wednesday, May 25, 1881.

Present, J. A. Robinson Esq., Counsel on behalf of Applicant; S. R. Throckmorton, the Applicant, in propria persona; J. F. Stuart Esq., Counsel for E. Wormouth.

Examination-in-Chief of G. F. Allardt (a witness on behalf of the applicant): By Mr. Robinson.

My name is G. F. Allardt, my age is 48 years, I reside in Oakland, and am a civil engineer and surveyor. I am a Deputy United States Surveyor and was Chief Engineer of the State Tide Land Survey from 1868 to 1873. I have had the experience of the last 23 years in surveying Spanish grants. I assisted in the survey of the Rancho Corte Madera del Presidio confirmed to Juan Reed. That is to say, the first survey; the Matthewson survey. I was principal assistant to R. C. Matthewson, Deputy United States Surveyor, who made a survey of the said rancho under instructions in 1858. I had charge of the party and run all the lines in the field.

Q. Mr. Throckmorton—Did you ascertain and run a
78 western boundary of that rancho at that time.

A. There was a trial line run on the west, but I don't know whether it was intended to be a boundary or not. I don't think it was returned to the office.

Q. Was it not intended to cut off a given quantity?

Obj. Mr. Stuart—We object to that upon the ground that the official field notes of the survey which the witness himself says he run of all the lines of the survey referred to are the best evidence and the only legal evidence that can be resorted to at this late day to ascertain what were the lines of that official survey, and said field notes cannot be contradicted by parole testimony or the recollections of the witness at this time.

A. My recollection is that it was merely a line of recon-

noisance; a line cutting off a given quantity is shown on the official map. This survey was returned to the Surveyor-General's Office in due form with the field notes and a map. I knew Leander Ransom during his lifetime. He held the position of United States Deputy Surveyor. He was instructed to make a survey of the western boundary of the Rancho Corte Madera del Presidio, but I am quite certain he never ran the line on the ground. I am familiar with the terms of the grant of the Rancho Corte Madera del Presidio to Juan Reed as made by the Mexican Government.

Q. What constitutes the boundary of said grant on the west?

Obj. Mr. Stuart—We object to that on the ground that we are not dealing with said grant but with the final decree of confirmation of said rancho; that the grant, judicial measurement and all the original papers are merged in the final decree of confirmation, and the boundaries of said rancho as judicially determined by the United States Courts are to be determind by that decree and not by the original grant.

A. I would like to refresh my memory by looking at the description. I don't recollect the exact words. (Refers to map.) The boundary of that grant on the west is the Arroyo Corte Madera del Presidio.

79 Obj. Mr. Stuart—I move to strike out the answer because it is not a correct answer to the question. It does not give the boundaries of the grant but merely an arroyo, which the witness seems to have located on a map which lies before him.

Ex. Y. Mr. Robinson—In reply I will put in evidence the map referred to in Mr. Stuart's objection, being a certified copy of a map accompanying the objections of S. R. Throckmorton to the survey of the Ranch Corte Madera del Presidio, heretofore marked Exhibit S. R. T. No. 6, and now to be marked in this proceeding "Exhibit Y."

Obj. Mr. Stuart—I move to strike out said map as evidence in this case, as no foundation has been laid for the introduction of said map.

Mr. Robinson—What constitutes the boundary of said grant on the north?

A. The Arroyo Corte Madera de San Pablo, or Arroyo Holon and San Francisco Bay.

Obj. Mr. Stuart—I move to strike out the answer as being incorrect and not in accordance with the grant as found in the title papers.

Q. Mr. Robinson—Is that also the southern boundary of the Pueblo of San Rafael?

Obj. Mr. Stuart—Objected to on the ground that no grant of the Pueblo of San Rafael has ever been presented or confirmed.

A. According to a description in some of the papers, the Pueblo of San Rafael is made the northern boundary of this rancho, which, I think, is the Arroyo Holon. I made for S. R. Throckmorton a survey of the tract of land colored yellow upon the map Exhibit Y before you marked "Tract of Land Owned and Referred to in the Objections by S. R. Throckmorton." I made the survey on the ground and followed the bounds and fences pointed out at the time by Mr. Throckmorton. It is a long time ago. If I had my field notes I could tell more about it. I can't remember all these things. This map Exhibit Y shows a survey of an enclosed tract of 80 land made at that time and claimed by Mr. Throckmorton. The character of the land between the Rancho Corte Madera del Presidio on the west and the western boundary of the Matthewson survey as established and surveyed by Matthewson is mostly hilly, the western portion being brushy, partly covered with underbrush and timber, precipitous. I made a survey of the public land in township 1 north, range 6 west, M. D. M., lying east of the Arroyo Corte Madera del Presidio. I had the line returned by Deputy Ransom as the western boundary of the Rancho Corte Madera del Presidio for the eastern boundary of that public land survey. As I stated, that line was run in the field. Whether or not it was established, I can't say. I ran the line in 1858 as a trial line. I ran it since to test the correctness of Ransom's measurements and the enclosure of his official notes. I am not aware that Leander Ransom made any survey in the field pertaining or relating to the western boundary of the Rancho Corte Madera del Presidio. I think not. I am very positive on that point, that he made no survey in the field, because I furnished him all the field notes that he returned. The Ransom survey was a compilation of State and private survey. The portion of that survey which was made by the State was all of the meanders of the bay and of the marshes. Leander Ransom returned two sets of field notes of the Rancho Corte Madera del Presidio, one of which included the salt marshes and the other excluded them. At the time I subdivided fractional township 1 north 6 west, I did not find any stakes or monuments on the

line Ransom returned as the west boundary of the Rancho Corte Madera del Presidio.

Q. From your knowledge of the location and survey of Spanish ranchos and from the original title papers in the case of the Corte Madera del Presidio Rancho, it is possible that there could be any public land east of the Arroyo Corte Madera del Presidio and south of the Holon?

Obj. Mr. Stuart—That is objected to because the decree of confirmation of said rancho is the only evidence that can be resorted to to answer a question of that kind, and this
81 witness is wholly incompetent to answer it, because he is not able to give here, in the first place, the original boundary of the grant. The question is wholly illegal.

A. I have stated that in my opinion those two arroyos form the exterior boundaries of the grant. That being the case, there can be no public land lying east or south of the said arroyos.

Obj. Mr. Stuart—I move to strike out the answer as being wholly incompetent, as the opinion can not be resorted to to prove boundaries in opposition to the final decree of confirmation.

Q. Mr. Robinson—If you were deputized by the United States Surveyor General to survey the Rancho Corte Madera del Presidio, with the papers of the case before you, where would you establish the western boundary?

Obj. Mr. Stuart—We object to that as wholly improper.

A. Before I could answer that question I would have to study over the papers to know what papers are before me. From papers that have been presented to me and from my knowledge of the land, I should make the arroyo Corte Madera del Presidio the western boundary of the rancho.

Q. Would that survey include the tract in controversy and marked on the map Exhibit Y, "Tract of land owned and referred to in the objections by S. R. Throckmorton?"

A. It would wholly include it.

Q. How far north would you follow the arroyo Corte Madera del Presidio?

A. To the point marked 3 on the said map, being near the source of the arroyo Holon.

Q. What natural landmark shown upon said map marks the northern boundary of said "grant?"

A. The Arroyo Holon in its entire course, and San Francisco Bay.

Q. What do the points marked "P" and "Q" on the map Exhibit Y designate or show?

A. They represent a line running from an old sawmill to the main bend of the Arroyo Holon. I do not know
82 whether that is the line referred to in the suit of ejectment brought by James C. Bolton against L. Van Reynegan in the United States Circuit Court. I compiled this map Exhibit, and that line P. Q. is taken from another map marked "Exhibit No. 2 to Tracy's deposition," being entitled "A map of the Rancho Corte Madera del Presidio according to the original diseno and juridical measurements, granted to Juan Reed, by C. C. Tracy, surveyor."

Ex. Z. Mr. Robinson—I now put in evidence the map referred to in the last answer of the witness, being a copy certified by the United States Surveyor General for California. (Marked "Exhibit Z.")

Obj. Mr. Stuart—I object to both the original and certified copy of said map, because said map is a map of a private survey made for private parties for speculative purposes and never had any official character to it, never was adopted by the United States in any way, shape or manner or recognized by the authorities in any way, shape or manner.

Mr. Robinson—In reply I will state that the said map is a certified copy of the map on file in the United States Circuit Court for the District of California introduced in the case of Bolton vs. Van Reynegan, and the line marked "Juridical possession" commencing at the old sawmill and running north 20 degrees east 162.605 chains.

Mr. Throckmorton—That line marked "Juridical possession" is the western boundary line described in the original complaint in said suit, and proved up by every one connected with said juridical possession, proved up by Bolton in said suit and is the only boundary line that has ever been proved by any witness for anybody on any one's account to the present day.

Obj. Mr. Stuart—I move to strike out the statement of Mr. Throckmorton as an attempt to give evidence in this case in an indirect way, by bare, naked statements without any proof; and I move to strike out the whole of it. Furthermore I object to this map, on the ground that it is not an official map, that it is a map of a private survey made for the speculative
83 object which has been proceeded with before the United States Court and before the executive department of

the Government for eight or ten years, and was gotten up with other papers for the purpose of making a grant of one league cover about two leagues or more of land; and furthermore, because the western boundary attempted to be proved by the said map is not named in the grant nor the juridical measurement nor the decree of confirmation of the United States District Court.

Mr. Robinson—In reply I will state that so far as the speculation is concerned, I have had nothing to do with it. All that I seek is to perfect the title to the tract shown upon said map, containing about 80 acres, which is the land involved in this controversy. This line shown on this map, Exhibit Z, takes in and includes the tract of land of S. R. Throckmorton, now in controversy.

Cross-examination of G. F. Allardt by Mr. Stuart.

The boundaries of the Rancho Corte Madera del Presidio are the Arroyo Corte Madera del Presidio on the west, the Arroyo Holon or Arroyo Corte Madera de San Pablo, and the Bay of San Francisco on the north. I don't think the name of Corte Madera del Presidio for the arroyo is used in the grant of the Corte Madera del Presidio Rancho, but the location of the creek is so described that it can be identified as being without doubt the Arroyo Corte Madera del Presidio. I think an arroyo is named in the grant as passing a place called Las Animas, and that is this Arroyo Corte Madera del Presidio. In order to be positive that an arroyo is mentioned in the grant, I must have the grant before me. My statements in regard to this matter are made from my own knowledge derived from the papers relating to this grant. I can't specify whether the words are in the grant or in other papers relating to the rancho. I think in the field notes of the juridical survey under the Mexican Government it fixes the Arroyo Corte Madera del Presidio as the western boundary. The juridical measurement commences at a point on said arroyo and runs from that point northerly, which describes the arroyo as a bound-

84 ary of said grant and identifies. I testify from recollection; I feel pretty positive on that point. I have seen the diseno or a description, I don't remember which, of the boundaries of San Rafael as they were originally established by the Mexican Government, in which the southern boundary of the Pueblo of San Rafael was designated as the Arroyo Holon, and that would make it the Reed Rancho or the said Rancho Corte Madera del Presidio on the north. I know nothing about surveys of the lands of San Rafael made by the

Mexican Government on the first day of October, 1834, defining boundaries, nothing further than what I have stated. I have never seen the boundaries of San Rafael as established by the Mexican Government and found by the map and field notes of the survey of said lands made by the said government on October 1st, 1834.

G. F. ALLARDT.

Subscribed and sworn to before me this 25th day of May, 1881.

CHAS. H. CHAMBERLAIN,
Receiver.

Law Office T. A. Robinson, 509 Montgomery street, rooms 3 and 4. San Francisco, Cal., 188

Stipulation.

Before the U. S. Land Office,

San Francisco, Cal.

January 23rd, 1882.

E. Wermouth.
vs.
S. R. Throckmorton } (T. 1 N., R. 6 W., M. D. M.)

It is stipulated and agreed that the further taking of testimony in the above entitled case may stand continued, to be resumed at any time upon notice of five (5) days to be served by the party desiring to call up the case, or by consent of both parties without said notice.

85

J. A. ROBINSON,
Attorney for S. R. Throckmorton.
JAMES F. STUART,
Attorney for E. Wormouth.

Department of the Interior,
United States Land Office.
San Francisco, Cal., Mar. 14, 1883.

S. R. Throckmorton
vs.
E. Wermouth,
H. R. Cushing. } Sections 28 and 29, T. 1 N., R. 6 W.

In this cause Mrs. Cushing was never brought into Court,

and has always and still does, refuse to voluntarily become a party to the above entitled action. On Jan'y 22, 1883, she caused citation to issue against said Throckmorton, to show cause why she should not be allowed to enter. In response to said citation, J. A. Robinson appeared this day and waived all contest with Mrs. Cushing. This case will now proceed as Throckmorton vs. Wermouth; Wermouth being a voluntary party to this contest.

WM. R. WHEATON,
Register.
CHAS. H. CHAMBERLAIN,
Receiver.
U. S. LAND OFFICE,
San Francisco, Cal'a.

Throckmorton
vs.
Wermouth.

Stipulation that the above case now pending in the U. S. Land Office will be resumed on the 12th day of May, 1885, at 10 o'clock a. m.

JAMES F. STUART,
Att'y for Wermouth.
J. A. ROBINSON,
Att'y S. R. Throckmorton Estate.
U. S. Land Office,
San Francisco, May 12th, 1885.

Throckmorton — J. A. Robinson Esq., Att'y.
vs.
Wermouth. — Jas. F. Stuart Esq., Att'y.

Case called this day pursuant to stipulation of counsel for both parties. Present all parties in interest.

Homestead Proof--Testimony of Claimant.

Ebenezer Wormouth being called as a witness in his own behalf in support of homestead entry No. 4415 for lot 3 of section 28 and lot 3, section 29, township 1 N., R. 66 W., M. D. M., testifies as follows:

My name is Ebenezer Wormouth. I am 62 years of age and my postoffice address is Saucelito, Marin County, Cal. I am a native-born citizen of the U. S., born in New York. I built my house on the land about 5 years ago in the fall of 1880. I went

to live there right after that. The house is 16x10 feet, a barn 26x16 feet, 2 sheds, one 36 by 14 feet and the other 16x15 feet. I fenced in 10 or 12 acres. I value my improvements at about $700.00 or $800.00. I have spent $500.00 or $600.00 in clearing and grubbing the land. My family consists of myself and wife. For the first two years I lived there continuously after that; we would live part of the time in that house and part of the time across the line in another house. I have never been absent from the homestead since making settlement. I used the land continuously all the time. Of late years I have not cultivated any of the land; only pastured it. There are not to my knowledge any indications of coal, salines or minerals of any kind on the land. I have never made any other homestead entry. I have never sold, conveyed or mortgaged any portion of the land.

E. WORMOUTH.

87 I hereby certify that the foregoing testimony was read to the claimant before being subscribed and was sworn to before me this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN.

Continuance of direct testimony of Ebenezer Wormouth by Mr. Stuart.

I have had possession of this land included in my homestead ever since March 5th, 1859, when I first settled there.

Q. State—Examine Map Ex. "C" Thockmorton and point out on said map the location of your house when you first settled there in March, 1859.

A. Witness points to the spot marked Wermouth's house on the map—the east of the grant line. That was my first house. The land I occupied in connection with that house from 1859 until I built my new house was a tract that I had in possession in 1859, and the same that I am in possession of now. When I lived in this first house in 1859, I supposed that I had erected my house on public lands of the U. S. The first house that I lived in in 1859 was about 35 feet south of the house marked on Ex. "C." This house was burnt down and in 1862 I built the house marked Wormouth's house on Ex. "C." When I lived in those houses previous to erecting my 3rd house, I supposed I was on public lands of the United States. I cultivated a portion of it for 8 or 10 years, more or less, between the time I settled in 1859 and the time I entered the land as a homestead. When I ascertained that my second house was claimed as being within the exterior bounds of the Mexican Grant, Rancho Corte Madera del Presidio, I built an-

other house outside on what I knew to be and what is now public land.

Objected to as being Mr. Stuart's testimony and not the witness', the witness having testified to having built his house on land which is now public land.

Question repeated. I built another one further on in what is public land now, was so laid down. I built the 3rd house on public land because in case there might be a change again I could have a house on the other side, too; I did not want to abandon my rights on the other side, if I had any, until the thing should be finally settled. When I say "by the
88 thing being finally settled," I mean the title to the ranch, to see whether there would be any changes in the surveys. It was my intention, in case the line of survey was changed, to endeavor to secure the land on which my second house was. When I was absent from my third house, erected by me on what is now public land, as stated by me, my wife and I resided in the second house. I was not absent from my third house since I settled for the period of six months constantly, when we were, we were in the second house.

Counsel for Wormouth now asks to have the records of this office considered in this case, as showing his early settlement as a pre-emptor on the land claimed by him and the filing of his D. S. September 14, 1880—No. 15,517—settled March 5, 1859.

As per map Ex. "C" Throckmorton that part of the fence along the creek was built by parties under whom I claim and bought out their improvements and the balance I built. When I built my last house, Throckmorton had a fence so as to enclose my fence and houses, but my barn, fence and my other houses were there long before he built any fence. This notice dated Oct. 1, 1872. I left a copy of it in Throckmorton's office and the other one dated Mar. 29th, 1877, when he built some more fence around there; I served a copy of it on him through his agent that was in charge of the ranch, Mr. Chas. Severance. [Counsel for Wormouth now offers these notices in evidence to be marked Ex. "A" Wormouth and Ex. "B" Wormouth. Counsel for Throckmorton now objects on the ground of these notices not identifying any land in this controversy.] These notices which I left at Throckmorton's office and served on his agent, as testified by me written and served, was in reference to the lands fenced in by Throckmorton so as to enclose the land claimed by me as marked on Ex. "C" Wormouth.

Counsel for Wormouth now offers in evidence an agreement between John J. Reed, Hilaria M. Reed, Thos. B. Deffebach and Ines Deffebach, his wife, and James Clinton Bolton, dated the 12th day of August, 1865, to be marked Ex. "C" Wor-
89 mouth.

Cross-examination by Mr. Robinson.

I came to California in September 6th, 1849. I settled in Marin County on the 7th day of January, 1850, and went to keeping house in 1859 right on the lands that I now occupy and occupied them ever since. I was not put out of possession by U. S. Marshal on Oct. 10, 1871, in the case of Bolton vs. Van Reynegan, Wormouth, et als. I was one of the defendants in that suit.

Q. Did not the U. S. Marshal call on you at that time?

A. Some man came there at that time and Mr. Hugh Boyle was with him; they said they claimed all that land south and east of me, but they did not want to remove me, nor did they remove me. I do not know the name of the U. S. Marshal. It was at the time the other settlers were put out, some man came there with Hugh Boyle; I don't know whether he was a U. S. Marshal or not. The other settlers were Commins, Louis De Nois and, I suppose, all the other defendants in that suit. I think it was the suit of James Clinton Bolton vs. John L. Van Reynegan, et al. I was one of the defendants in that suit. I suppose judgment was taken against me. I was not in Court, but I suppose there was something of that kind; am not positive.

Q. Ex. "W" Throckmorton is a certified copy of a writ of restitution issued in the case of Bolton vs. Van Reynegan et al. attached to it is the U. S. Marshal's return, in which he states that he served the same on the defendants, including Edward Wormouth, on Oct. 10, 1871. Question withdrawn.

I changed from a pre-emption to a homestead so as to have my time date back to the time I first settled there and to save my rights on the land. The first house I bought, and it is now burnt. I bought it from Saml. Warren, on the 3rd or 4th of March, 1889, and I took possession on the 5th of March, 1889. He sold me all the improvements, that is, chickens and everything he had—hay, furniture, house, fences and right and title to the place. The fence was built along the creek at that time. Throckmorton built the fence enclosing me at the time
90 served these notices on him. His heir is at present in possession of the land between my fence and his fences. They use it for grazing; they also plowed up a part of it and

raised some hay. At the time I built the house marked "Wermouth's" in Ex. "C" I was not notified by Throckmorton that he claimed the land; that house was my second house, and I built that either in 1862 or 1863, after the first one was burned down, and when the land was considered public land. I built the house I live in now, I think, about 5 years ago, in the fall, about September or October. I was not forbidden by Mr. Throckmorton to build at that time. He did institute a suit against me for that little corner inside of the Grant line. I do not know what became of that suit; he died, his counsel died and my counsel went off.

E. WORMOUTH.

Subscribed and sworn to before me this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

Homestead Proof—Testimony of Witnesses.

James Commins, being called as a witness in support of the homestead entry of Ebenezer Wormouth for lot 3 of section 28, lot 3 of section 29, T. 1 N., R. 6 W., M. D. M., testifies as follows:

I am a farmer and reside at Saucelito, Marin County, Cal. I have known Ebenezer Wormouth, the claimant in this case, for over 25 years. Claimant was qualified to make an entry of homestead. He is a native-born citizen of the U. S., over 21 years of age. I think he was married and never made a former entry of homestead to my knowledge. I don't know when claimant settled upon the homestead. Four or five years ago he went to live there, right after putting up the house 4 or 5 years ago. He has a small house 20x12 feet; fine barn 30x20 feet; 2 large sheds, a field fenced in. Total value about $500.00, $600.00 or $700.00. I do not know whether they resided there continuously; I have seen him there many a time.

I do not think he has been absent at all. I do not know
91 of his being absent. He used the land for pasture only these last 4 or 5 years. I do not think there are any indications of coal, salines or minerals of any kind on the homestead. I don't think the claimant has mortgaged, sold, or contracted to sell any portion of said homestead. I am not interested in this claim, and I think he has acted in good faith.

JAMES COMMINS.

I hereby certify that the witness is a person of respectability; that the foregoing testimony was read to him before being sub-

scribed, and was sworn to before me this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

Continuation of direct testimony of James Commins. By Mr. Stuart.

I have lived in the vicinity of these lands since 1859. Wormouth lived there before me. I do not know how long. I knew him to live in both houses. The one marked on Ex. "C" and in the other house south of this one, which was burnt down since 1859. He has lived in one or the other of those two houses, as also the one erected by him on what is public land now, since 1859. He has never been out of there.

Cross-examination by Mr. Robinson.

I have resided in Saucelito about 25 years since 1859. I lived on the Reed Ranch in Saucelito township. My house is east of Wormouth's house. I do not now own the land upon which I reside. I am nobody's tenant. I have resided in California since 1852. I lived in Tomales, the north end of the county, before I went to live on the Reed Ranch. I was raising stock up there. I left there in 1859; I had rented the Reed Ranch for stock. I first became acquainted with Wormouth where he lives or thereabouts. I found him there after I had leased the ranch. I do not know whether I told him I had leased the ranch or not. I do not think I did. By the Reed Ranch, which I had leased, I mean the Rancho Corte Madera del Presidio. My lease was in writing. I haven't it with me. It is on record. I do not know whether Mr. Wormouth was
living on the Reed Ranch as it then existed or was
92 known; they did not claim up there as the Reed Ranch
then. I kept my stock all over the ranch. There was no fence dividing the Reed Ranch from the Saucelito Ranch in 1859. Some of my cattle ranged all over Saucelito Ranch.

JAMES COMMINS.

Subscribed and sworn to before me, this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

Recess till 1 p. m.

Homestead Proof—Testimony of Witness.

Peter Gardner, being called as witness in support of the homestead entry of Ebenezer Wormouth for lots 3, Sec. 28, lot 29, T. 1 N., R. 6 W., M. D. M.:

I am a farmer and reside in Marin County, California. I am well acquainted with Ebenezer Wormouth, the claimant in

this case, ever since he made his homestead entry No. 4415. Claimant was qualified to make such entry; he was over 21 years of age, a native-born citizen of the U. S., was a married man with a wife and never made a former entry of homestead to my knowledge. Claimant settled upon the homestead prior to 1860; he went to reside there prior to 1860. He has a house 20x12 feet, a barn 30x20 feet, chicken houses, sheds, some fencings. Total value about $500.00. Claimant and family have resided continuously on the homestead; I think so; I have been away for about two years; he was living there when I went away, and I found him there when I returned. I do not know of him as being absent for any period from said land since making settlement. There is about 5 or 6 acres of the homestead cultivated; he raised a crop for several years, then grubbed 5 or 6 acres and raised a crop on that, and used it since for pasture. There is not any indications of coal, salines or minerals of any kinds on the homestead that I know of. I do not know whether claimant mortgaged, sold or contracted to sell any portion of homestead. I am not interested in this claim, and I think he has acted in good faith.

PETER GARDNER.

93 I hereby certify that the witness is a person of respectability; that the foregoing testimony was read to him before being subscribed, and was sworn to before me this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

Continuation of direct testimony of Peter Gardner by Mr. Stuart.

Q. Please examine map Ex. "C" Throckmorton, and find out about where, if you can, Wormouth's first, second and third house were and are located thereon, if you know of any such house having been erected and now being on the land.

A. The one shown on this map is the second house. The first was burnt down. It stood a few feet south of this one. The third one is not shown on this map. The third house is about 100 to 150 feet northwesterly from the second house—across the yellow line shown on this map (grant line). The line indicated is the enclosure of Wormouth marked "along fence." I know the barn within that enclosure marked "barn"; it is Wormouth's. The line now marked as the western boundary line of the Rancho Corte Madera was not run when Wormouth built his first two houses. The land at the

time, and upon which these two houses were built, was considered public land.

Cross-examination by Mr. J. A. Robinson.

Q. You were asked "what would this line indicate?" You answered: It is the enclosure of Wormouth marked "along fence." Is not this tract within the limits of the land claimed by the applicant, S. R. Throckmorton, as shown upon Ex. "C"?

A. It is. This line (pointing on diagram to line marked "along fence") is Wormouth's; and this, following the black line to the east of the yellow line from north to south and thence running west and northwest represented by the yellow line and thence along the black line from west to post A and thence to post on N. E. corner, represents the claim of S. R. Throckmorton.

Q. Were the houses 2 and 3 erected within the Throckmorton enclosure by Wormouth?

A. No; within Wormouth's enclosure. But Wormouth's enclosure is within Throckmorton's enclosure.

Counsel for Wormouth objects to the question, as it don't state to the witness whether they were erected inside of Throckmorton's enclosure, as it is, or before Throckmorton's enclosure was made.

At the time these houses were erected Throckmorton had no enclosure there. I don't know when Wormouth built the fence. It was there prior to 1856. I don't know who built it. Wormouth occupied it since 1860. I never saw him build any fences there. For several years he raised grain there and cut it for hay. I think the yellow line on Ex. "C," marked western boundary line, shows the patent line of the western boundary of the Rancho Corte Madera as established. I know that Wormouth's house is on public land because it lies west of the patented line of the grant marked as public land on the public surveys.

PETER GARDNER.

Subscribed and sworn to before me, this 12th day of May, 1885.

CHAS. H. CHAMBERLAIN,
Receiver.

It is now stipulated by the counsel hereto:

1st. That the U. S. patent for the Rancho Corte Madera del Presidio, confirmed to Juan Reed, has been issued and the lines thereof established.

2nd. That the public land in township 1 north, range 6 west, M. D. M., has been surveyed and the approved township

plat thereof is now on file in the U. S. Land Office of this City.

3rd. That the testimony heretofore taken in this case shall be considered as taken regularly and without objection as to dates.

San Francisco, May 12th, 1885.

J. A. ROBINSON,

94 Att'y for S. R. Throckmorton.

JAMES F. STUART.

May 19, 1885.

Case called pursuant to adjournment.

Present all parties in interest.

Counsel for Wormouth asks to have the various maps filed in this U. S. Land Office of township in which these lands lie (1 N., 6 W., M. D. M.) considered in deciding this case, also the entries upon the tract book in reference to the lands in contest, with reference to letters of Hon. Commissioner in reference thereto.

Adjourned till Friday, May 22, 1885, at 2 p. m.

Friday, May 22, 1885.

Case called pursuant to adjournment.

Present, all parties in interest.

Case closed forty days for Mr. Robinson to file brief and thirty days allowed Mr. Stuart to reply.

May 22nd, 1885.

San Francisco, Oct. 1st, 1872.

To Samuel R. Throckmorton and J. C. McCeney.

Sirs: You will hereby take notice that the lands you are now fencing, between my house and Mrs. King's, in Marin County, Sauciletto Township, are owned and claimed by *me*.

EBENEZER WORMOUTH.

Ex. "A" Wormouth.

Saucelito, March 29, 1877.

To Samuel R. Throckmorton.

Att'y for E. Wormouth.

Sir: You will hereby take notice that the lands you are now fencing on the northeast side of the crick leading up towards Dr. Cushens in Marin County I now owne and claim under pre-emption.

E. WORMOUTH.

Ex. "B" Wormouth.

(Endorsed:) To Samuel R. Throckmorton.

95

Copy of notice.

Ex. "C" Wormouth.

25 Cents in U. S. Inter. Rev. St'p.

Whereas, John J. Reed, Hilarita M. Reed, Thomas B. Deffebach and Ines Deffebach, his wife, have this day executed and delivered to me a deed of the undivided *one-half* part of all of the Rancho "Corte Madera del Presidio," situate in the County of Marin, in the State of California, *which is not included* in the survey of the said rancho which was made under instructions from the U. S. Surveyor General for the State of California, by R. C. Mattthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor General for California, September 19th, 1859, said approved survey containing four thousand four hundred and sixty 24-100 (4,460.24) acres of land; the said rancho being the same which was granted to Juan Reed by the Mexican Government. Now, therefore, in consideration of the execution and delivery of said deed, I hereby agree with them to give my professional services before the Courts of the United States and the proper authorities at Washington, and to use my best endeavors to procure a patent for them from the United States Government of the said rancho, without any expense or charge whatever to them excepting the expense of a new survey of said land (which they, themselves are to pay), and in case I shall fail to *obtain* a patent for more than is included in the above mentioned approved survey, then I shall procure for them, free of all charges, a patent for the land included in the said approved survey.

In witness whereof, I have hereunto set my hand and seal, at the City of San Francisco, this twelfth day of August, A. D. eighteen hundred and sixty-five.

[Seal.] JAS. CLINTON BOLTON.

In presence of

ATKINSON HOLCOMBE.

96

State of California,

City and County of San Francisco—ss.

On this twelfth day of August, A. D. one thousand eight hundred and sixty-five, before me, H. S. Homans, a Notary Public in and for said City and County, duly commissioned and sworn, personally appeared the within named James Clinton

Bolton, whose name is subscribed to the annexed instrument as a party thereto, personally known to me to be the individual described in and who executed the said annexed instrument, and he acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in said City and County the day and year last above written.

H. S. HOMANS,

[L. S.] Notary Public.

Recorded October 6th, 1871, at 9 o'clock a. m., at the request of T. B. Deffebach.

State of California,

County of Marin—ss.

I, Geo. W. Davis, County Recorder in and for said county, do hereby certify the annexed to be a true, full and correct copy of the original record of an instrument as the same is recorded in my office in Book "K" of deeds, at page 43.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 16th day of May, A. D. 1881.

GEO. W. DAVIS,

[Seal.] Recorder.

By .....

Deputy Recorder.

97

EXHIBIT "B."

Field notes of a tract of land in Marin County, California, surveyed January 7th, 1871, for S. R. Throckmorton, by G. F. Allardt.

Beginning at a post marked "C. M. P. 181," distant 20 chains north of corner to Secs. 28, 29, 32 and 33, T. 1 N., R. 6 W., Mount Diablo Meridian, from which post a madrona tree 4 feet in diam. marked B. T.-C. M. P. 181. bears S. 24 E. distant 87 links; thence according to the true meridian the magnetic variation being 16 degrees 20 minutes east along the western boundary line of the Rancho "Corte Madera del Presidio," known as the "Ransom survey line"; N. 9 E. 20.45 chains to its intersection with S. R. Throckmorton's claim; thence along said claim N. 9 W. 9.50 chains to a post in stone mound; No. 70.¾ W. 10.70 chs. to a post marked A on top of a grassy spur, and descd.; S. 73.¾ W. 16.65 chains to the center of the Arroyo Principal del Corte Madera del Presidio, the northeasterly

boundary line of the Rancho "Saucelito" from which a redwood stump 27 inches in diam., marked W., bears N. 73.¾ E. distant 15 links; thence down the center of said Arroyo, being the northeasterly boundary line of the Rancho "Saucelito," as follows: S. 39.¾ E. 1.50 chains to Sta., S. 4½ E. 10.74 chains to Sta. S. 35 E. 10.30 chains to Sta. (at 5 chs. the west fork of said Arroyo joins from the west); S. 71.¼ E. 10.78 chains to Sta. N. 70.¼ E. 3.90 chains to Sta. S. 33.¾ E. 40 links to Sta. on line between Secs. 28 and 29 of said township, distant 17.55 chains north of corner to Sections 28, 29, 32 and 33; thence leaving the boundary line of the Rancho "Saucelito" and along section line; north 2.45 chains to the beginning.

Containing an area of 73.86 acres, viz: In lot 2, Sec. 28, 2.27 acres; in lot 3, Sec. 28, 3.16 acres; in E. ½ of N. E. ¼ of Sec. 29, 22.46 acres; in lot 1, Sec. 29, 2.87 acres; in lot 3, Sec. 29, 43.10 acres. Total as above 73.86 acres. Land mostly hilly, except a narrow strip along the arroyo.

[Map.]—See original transcript.

FINAL OATH OF DEPUTY SURVEYOR.

I, G. F. Allardt, Deputy Surveyor, do solemnly swear that I have well, faithfully and truly, in my own proper person and in strict conformity with the instructions furnished by the Surveyor General, the Surveying Manual and the laws of
98 the United States, surveyed a tract of land in sections 28 and 29, T. 1 N., R. 6 W., Mount Diablo Meridian, is represented in the foregoing field notes as having been surveyed under my directions; and I do further solemnly swear that all the corners of said surveys have been established and perpetuated in strict accordance with the Surveying Manual and printed instructions, and that the foregoing are the true and original field notes of such survey.

G. F. ALLARDT,
U. S. Deputy Surveyor.

Subscribed and sworn to before me, this 5th day of Feb'y, 1881.

J. A. ROBINSON,
U. S. Commr.

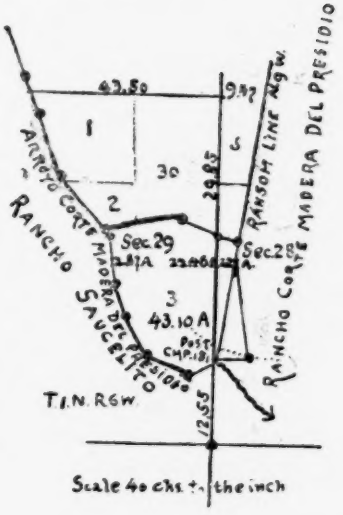
"EXHIBIT D" (Petition).

Senor General of the
Territory of Upper California.

Juan Read, of the Irish Nation, before your Excellency with due respect presents himself and says: That not having been able to obtain the place called "El Saucelito," he prays you to

16896

84 A


43.50
9.97
1
30
29.85
6
2
3
43.10 A
Sec 29
Sec 28
RANCHO SAUCELITO
ARROYO CORTE MADERA
RANSOM LINE N&W.
RANCHO CORTE MADERA DEL PRESIDIO
POST CMP. IB
T.1.N. R6W.
12.55
Scale 40 chs. + to the inch

be so good as to grant him the place of "El Corte de Madera del Presidio" to the "Punta del Tiburon," as shown by the sketch or plan which your Excellency has in your possession. Wherefore, I pray your Excellency to be so good as to grant my petition, by which I shall receive favor and grace.

JUAN READ.

Pueblo de San Rafael, September 4th, 1834.

EXHIBIT E. (Grant and Juridical Possession).

Monterey, Sept. 23rd, 1834.

Join this to the foregoing.

FIGUEROA.

Stamp first (seal) six dollars.
For the years one thousand eight hundred and thirty-two and one thousand eight hundred and thirty-three.

EXHIBIT D AND E.

99 Jose Figueroa, General of Brigade of the Mexican Republic, Commanding General and Inspector and Superior Political Chief of Upper California.

Whereas, Don Juan Read, naturalized in the United States of Mexico, for his own personal benefit and that of his family, asked for the land known by the name of "Corte de Madera del Presidio" as far as "La Punta del Tiburon," bounded by the Mission of San Rafael and the Port of San Francisco, the proper measures and examinations being previously made as required by Laws and Regulations, using the powers which are conferred on me in the name of the Mexican Nation, I have, by decree of this day granted to the aforesaid Don Juan Read the above mentioned land, declaring to him the ownership of it by these presents, said grant being understood to be in entire conformity with the laws, subject to the approval or disapproval of the Most Excellent Territorial Deputation and of the Supreme Government, and under the following conditions:

1st. That he will submit to those (conditions)which may be established by the regulation which is to be formed for the distribution of vacant lands, and that in the meantime neither the grantee nor his heirs can divide or alienate that which is granted to them, subject it to any tax, entail, pledge, mortgage or other incumbrances even for pious purposes, nor convey it to mortain.

2nd. He may enclose it without prejudice to the crossings, roads and servitudes; he will enjoy it freely and exclusively, applying it to the use and cultivation which may best suit him;

but within one year at furtherest he will build a house and it will be inhabited.

3rd. When the ownership is confirmed to him, he will request the proper magistrate to give him juridical possession in virtue of this patent by whom the boundaries will be marked out, in the limits of which he will place some fruit or forest trees of a useful character.

4th. The land of which donation is made is one square league, a little more or less, as shown by the map which goes with the Expediente. The magistrate who may give the possession will cause it to be measured in conformity with
100 the ordinance in order to mark out the boundaries, leaving the surplus which may result to the nation for its convenient uses.

5th. If he contravene these conditions he will lose his right to the land and it will be denounceable by another person.

In consequence I order that this present, serving him for a title and being held as firm and valid, note be made of it in the corresponding book, and it be delivered to the person interested for his security and other purposes.

Given at Monterey on the second of October, eighteen hundred and thirty-four.

(Signed) JOSE FIGUEROA.

(Signed)
AGUSTIN V. ZAMORANO,
Secretary.

Note has been made of this title (in the book) of entries of grants of land on folio fifty-four number fifty-two which exists in the Secretaria in my charge. In Monterey on the 2nd of October, 1834.

(Signed)
ZAMORANO.

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* * * Being in the fields in the place named "Corte de Madera del Presidio de San Francisco" on the twenty-seventh day of the month of November, one thousand eight hundred and thirty-five, I, the constitutional Alcalde, acting in virtue of my office with two assistant witnesses for want of a public Notary the witnesses by me examined present citizen Juan Reed, owner of said lands and citizen Fernando Felis on the part of the Pueblo of San Rafael, as mayor domo of said pueblo and community, the only colindante on the north, I proceeded to see and examine the lands of said rancho, and for

greater clearness, mounting on horseback in company with both the parties and witnesses referred to, I ordered the latter to point out to me the places, limits and boundaries of them, according to the signs which they have declared on their depositions, and in conformity they led the way to the west
101 to a canada where they showed me a forest of tall trees which they call redwoods in the canada itself, and some little valleys which form the base of the high peak called "Palmos," which forest is called "Corte de Madera 'del Presidio," a little brook with a willow thicket, and the remains of a rancheria called "Anamus"; thence continuing the examination and view of said lands they led me north to another arroyo and forest of redwood trees called also "Corte de Madera de San Pablo," and they said it was the boundary with the Pueblo of San Rafael; and thence continuing the examination south as far as Point Taburon, which they said was the limit in that direction; we continued to the west to the point of an Estero which empties in the bight formed by said Point Taburon and Point Caballos on the south and which ends at the entrance of said canada where is situated the house of the owner of said lands, Don Juan Read, the arroyo, willow thicket and forest of redwood trees named "Corte de Madera del Presidio" aforesaid, which they said was the last boundary of the said lands pertaining to the rancho referred to, of "Corte de Madera" of Senor Read; which places I, the constitutional Alcalde, saw and examined with those of my assistance and said witnesses, and the papers presented, having been compared with said examination, the identification of the aforesaid lands proved to be certain according to the declarations of the witnesses; and in testimony I make official record of it and sign it with those of my assistance and others who knew how; to which I certify.

(Sgd.) HARO,
" FERNANDO FELES,
" JOSE DE LA C. SANCHEZ.
" TOMAS JEREMIAS JONES.
" MANUEL SANCHEZ.

Assisting witnesses
(Signed) EUSEBIO GALINDO,
" FRANCISCO SANCHEZ.

Office of the
102 SURVEYOR GENERAL
of the United States, for California.

I, Theo. Wagner, Surveyor-General of the United States for the State of California, and as such, having in my office and in my charge and custody, a portion of the Archives of the former Spanish and Mexican Territory, of Department of Upper California, as also the papers of the late Board of Commissioners to ascertain and settle the private land claims in California; by virtue of the power vested in me by law, do hereby certify, that the seven preceding and hereunto annexed pages of paper numbered from one to seven inclusive, exhibit a true, full and correct copy of Extracts from Translations of Expediente and Juridical Possession filed in Case No. 497 on the docket of the foresaid Board of Commissioners, "Claim of Heirs of Juan Read to Corte de Madera del Presidio," and now on file in this office, and in my custody; that I have carefully compared the same with said translations and that the same is a correct transcript therefrom, and of the whole of such translations.

In Testimony Whereof, I have hereunto signed my name officially, and caused my seal of office to be affixed, at the City of San Francisco, this fourteenth day of February, 1881.

[Seal.] THEO. WAGNER,
U. S. Surveyor-General for California.

"EXHIBIT F."

Decree of Board of Land Commissioners.

Heirs of Juan Read
vs.
The United States.

In this case on hearing the proofs and allegations, it is adjudged by the Commission that the said claim of the petitioners is valid and it is therefore hereby decreed that the same be confirmed.

The land of which confirmation is hereby made is the same on which said Juan Read resided in his lifetime; is known by the name of Corte de Madera del Presidio, is situated in
103 Marin County and bounded as follows, to wit: Commencing from the solar which faces west at a point at the slope and foot of the hills which lie in that direction and on the edge of the forest of redwoods called Corte de Madera del Presido, and running from thence in a northwardly direction four thousand five hundred varas to an arroyo called Holon where is another forest of redwoods called Corte de Ma-

dera de San Pablo; thence by the waters of said arroyo and the Bay of San Francisco ten thousand varas to the Point Taburon, said point serving as a mark and limit; thence running along the borders of said bay and continuing in a westerly direction along the shore of the bay formed by Point Caballos and Point Taburon, four thousand seven hundred varas to the north of the Canada and the point of the "Sausal" which is near the Estero lying east of the house on said premises which was occupied by said Juan Read on November, 1835; and thence continuing the measurement from east to west along the last line eight hundred varas to the place of beginning; containing one square league of land, be the same more or less; being the same land described in the testimonial of juridical possession on file in this case, as having been measured to said Juan Read under a grant of the same to him, to which testimonial and the map therein referred to and constituting a part of the expediente a traced copy of which is filed in the case reference is to be had.

ALPHEUS FELCH,
R. AUG. THOMPSON,
Commissioners.

(Endorsed.)

No. 497. Heirs of Juan Reid. Corte de Madera del Presidio. Decree of Confirmation. Filed in office June 13, 1854.

GEO. FISHER,
Secretary.

Recorded in Record of Decisions, volume 2, page 104.

GEO. FISHER,
Secretary.

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104 Office of the
SURVEYOR-GENERAL
of the United States, for California.

I, Theo. Wagner, Surveyor-General of the United States for the State of California, and as such, having in my office and in my charge and custody a portion of the Archives of the former Spanish or Mexican Territory, or Department of Upper California, as also the papers of the late Board of Commissioners, to ascertain and settle the private land claims in California; by virtue of the power vested in me by law do hereby certify that the three preceding and hereunto annexed pages numbered from one to three inclusive, exhibit a true, full and correct copy of the original decree of confirmation filed in case No. 497 on the Docket of the foresaid Board of Commissioners

together with the endorsements thereon Heirs of Juan Reid Corte de Madera and now on file in this office and in my custody: that I have carefully compared the same with said original, and that the same is a correct transcript therefrom, and of the whole of such original.

In Testimony Whereof, I have hereunto signed my name officially, and caused my Seal of Office to be affixed, at the City of San Francisco, this 4th day of February, 1881.

[Seal.] THEO. WAGNER.

U. S. Surveyor-General for California.

"EXHIBIT G."

In the District Court of the United States, Northern District of California.

The United States, Appellants, vs. Heirs of John Read, Appellees.	No. 183 Corte de Madera del Presidio. Transcript No. 497.

Stated Term January 14th, 1856.

On appeal from the final decison of the Board of Commissioners to ascertain and settle private land claims in California.

Decree.

This cause came on to be heard at a stated Term of the Court on appeal from the final decision of the Board of Com-
105 missioners to ascertain and settle the private land claims in the State of California under the Act of Congress approved on the 3rd of March, A. D. 1851, upon the transcript of the proceedings and decision of the Board of Commissioners, and the papers and evidence on which the said decision was founded, and it appearing to the Court that the said Transcript has been duly filed according to law, and counsel for the respective parties having been heard, it is by the Court hereby ordered, adjudged and decreed that the said decision be, and the same is hereby in all things affirmed, and it is likewise further ordered, adjudged and decreed that the claim of the Appellees is a good and valid claim, and that the said claim be, and the same is hereby confirmed to the extent and quantity of one square league, being the same land described in the grant and of which the possession was proved to have been long enjoyed. Provided that the said quantity of

one square league now confirmed to the claimants be continued within the boundaries called for in the said grant and the map to which the grant refers, and if there be less than that quantity within the said boundaries, then we confirm to the Claimants that less quantity.

OGDEN HOFFMAN, Jr.,
U. S. District Judge.

Endorsed: Filed January 14, 1856.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy Clerk.

At a stated Term of the District Court of the United States of America, for the Northern District of California, held at the Court Room in the City of San Francisco, on Thursday, the second day of April, in the year of our Lord one thousand eight hundred and fifty-seven.

Present: The Honorable Ogden Hoffman, District Judge.

The United States vs. Heirs of Juan Reid. } D. C. 183. L. C. 497.

The Attorney General of the United States, having given notice that appeal will not be prosecuted in this case,
106 and a stipulation to that effect having been entered into by the U. S. Attorney on motion of the District Attorney, it is ordered, adjudged and decreed that the Claimants have leave to proceed under the decree of this Court heretofore rendered in their favor as under Final Decree.

OGDEN HOFFMAN,
U. S. Dist. Judge.

Endorsed: Filed April 2nd, 1857.

JOHN A. MONROE,
Clerk.

By W. H. CHEVERS,
Deputy.

I, William H. Chevers, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing to be full, true and correct copies of their respective originals now on file, and remaining of record in my office.

Witness may hand the Seal of the said Court this seventh

day of May, A. D. 1858.

W. H. CHEVERS,
[Seal.] Clerk.

(Endorsed) *383.*

United States District Court, Northern District of California.

The United States vs. Heirs of Juan Read. } Corte de Madera del Presidio.

Filed U. S. S. Genl's Office, May 7, 1858.

Office
of the SURVEYOR GENERAL of the
United States for California.

I, T. Wagner, Surveyor-General of the United States for the State of California, do hereby certify that the four pages preceding and hereunto annexed is a full, true and correct copy of a certain instrument of writing now of record and on file in this office and in my custody; that I have carefully compared the same with said original, and that the same is a cor-
107 rect transcript therefrom, and of the whole of such original.

In Testimony Whereof, I have hereunto signed my name officially and caused my Seal of Office to be affixed at the City of San Francisco this 5th day of February, 1881.

[Seal.] THEO. WAGNER,
U. S. Surveyor-General for California.

(EXHIBIT H.)

Deed from John J. Reed, Hilaria M. Reed, Thomas B. Deffebach and Inez Reed, his wife, parties of the first part, to James C. Bolton of the City, County and State of New York, the party of the second part, dated the 12th day of August, 1865, whereby in consideration of $1.00 the parties of the first part granted, bargained, sold, remised, released and conveyed all the undivided one-half part of all the Rancho "Corte de Madera del Presidio," situate in the County of Marin, in the State of California, which is not included in the survey of the said Rancho, which was made under instructions from the U. S. Surveyor-General for the State of California by R. C. Matthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor-General for California, September 19, 1859, said approved survey containing four thousand four hundred and sixty 24-100 (4460.24) acres of land. The said rancho being the same which was granted to Juan Reed by the Mexican Government. It being expressly under-

stood that this deed conveys no interest in the four thousand, four hundred and sixty 24-100 acres embraced in the above-mentioned approved survey.

Duly acknowledged by all parties August 12th, 1865, recorded August 16th, 1865, in the County Recorder's office of Marin County, in book "E" of Deeds at page 460.

(EXHIBIT "J.")

Deed from James Clinton Bolton of the City, County and State of New York, party of the first part, and Rudolph Steinbach of the City and County of San Francisco, State of
108 Cal'a, party of the second part, dated the 16th day of September, 1865, whereby in consideration of the sum of $5.00, the party of the first part granted, bargained and sold, conveyed and confirmed all the undivided one-fourth part of all the Rancho Corte Madera del Presidio, situate in the County of Marin, in the State of California, which is not included in the survey of the said rancho which was made under instructions from the U. S. Surveyor General for the State of California by R. C. Mathewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor General for California, Sept. 19, 1859. Said approved survey, containing four thousand four hundred and sixty 24-100 (4460.24) acres of land. The said rancho being the same which was granted to Juan Reid by the Mexican Government.

Acknowledged by the party of the first part September 16th, 1865; recorded September 22nd, 1865, in the County Recorder's office of Marin County in book "E" of Deeds at page 417.

(EXHIBIT "K.")

Deed from Rudolph Steinbach of the City and County of San Francisco, party of the first part, to Emil Steinbach of the same place, the party of the second part, dated the 28th day of March, 1866, whereby in consideration of the sum of $1000.00 the party of the first part granted, bargained and sold, remised, released and conveyed all the undivided one-fourth part of all the Ranch "Corte de Madera del Presidio," situate in the County of Marin in the State of California, which is not included in the survey of the said rancho which was made under instructions from the U. S. Surveyor General for the State of California, by R. C. Matthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, U. S. Surveyor General for California, September 19th, 1859, said approved survey containing four thousand four hundred and

sixty 24-100 (4460.24) acres of land. The said ranch being the same which was granted to Juan Reed by the Mexican Government.

Duly acknowledged by the party of the first part
109 March 28th, 1866; recorded May 26th, 1866, in the County Recorder's office of Marin County in Book "E" of Deeds at page 569.

(EXHIBIT "L."

Know all men by these presents, That I, Emil Steinbach, late of the County of Napa, now residing at the City of San Francisco, State of California, have made, constituted and appointed and by these presents do make, constitute and appoint Rudolph Steinbach of the City of San Francisco, State of California, my true and lawful attorney for me and in my name and stead, and for my use and benefit to ask, demand, sue for, recover and receive all sums of money, debts and demands whatsoever, which are now due and owing or shall hereafter become due, owing or demandable to me and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof by attachments, arrests, distress or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for me and in my name to make, seal and deliver, to receive legacies and bequests, to collect rents, interests, dividends or annuities due or to grow due, to bargain, contract, agree for, purchase, receive and take lands, tenements and hereditaments and accept the seizen and possession of all land and all deeds and other assurances in the law therefor and to lease, let, demise, bargain, sell, remise, release, convey, mortgage, hypothecate lands, tenements and hereditaments, upon such terms and conditions and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature and kind soever, and for also for me and in my name, and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes,
110 receipts, evidences of debt, releases and satisfaction of mortgages, judgments and other debts, and other instruments in writing of whatever kind and nature and other

attorneys, one or more, in his place and stead or under him, to make, constitute and appoint and the same at his pleasure to annul, remove and revoke.

Giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Witness Whereof I have hereunto set my hand and seal the 18th day of February, 1864.

EMIL STEINBACH. [Seal.]

Signed, sealed and delivered in the presence of

F. J. THIBAULT.

Duly acknowledged by Emil Steinbach February 19th, 1864; recorded April 25th, 1867, in the County Recorder's Office in Book "B" Powers of Attorney at page 163.

(EXHIBIT M.)

Deed from Emil Steinbach of the City and County of San Francisco, State of California, the party of the first part, to Emil Grisar, of the same place, the party of the second part, dated 16th day of June, 1866, whereby in consideration of the sum of $1250.00 the party of the first part granted, bargained and sold all the undivided one-fourth of all the Rancho "Corte de Madera del Presidio," situate in the County of Marin, in the State of California, which is not included in the survey of the said rancho which was made under instructions from the U. S. Surveyor-General of the State of California, by R. C. Matthewson, Deputy Surveyor, on October, 1858, and approved by J. W. Mandeville, U. S. Surveyor-General for California, September 19th, 1859, said approved survey containing four
111 thousand four hundred and sixty 24-100 (4460.24) acres of land, the said rancho being the same which was granted to Juan Reid by the Mexican Government.

Duly acknowledged by Rudolph Steinbach as the attorney in fact of Emil Steinbach, June 18th, 1866, recorded April 25, 1867, in the County Recorder's Office of Marin County in Book "F" of Deeds at page 279.

(EXHIBIT "N.")

Deed from Emil Grisar of the City and County of San Fran-

cisco, State of California, the party of the first part, to Samuel R. Throckmorton of the same place, party of the second part, dated June 19th, 1866, whereby in consideration of the sum of $1250.00 the party of the first part granted, bargained and sold, conveyed and confirmed all the one-fourth part of all the rancho "Corte de Madera del Presidio," situate in the County of Marin, in the State of California, which is not included in the survey of said rancho which was made under instructions from the U. S. Surveyor-General for the State of California by R. C. Matthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor-General for the State of California, September 19th, 1859, said approved survey containing four thousand four hundred and sixty 24-100 (4460.24) acres of land, the said rancho being the same which was granted to Juan Reid by the Mexican Government.

Duly acknowledged by Emil Grisar, June 21st, 1866, recorded April 25th, 1867, in the County Recorder's Office of Marin County in Book "F" of Deeds at page 278.

(EXHIBIT "O.")

Deed from James Clinton Bolton of the City, County and State of New York, the party of the first part to Thomas B. Valentine of the City and County of San Francisco, State of California, the party of the second part, dated the 25th day of July, 1868, whereby in consideration of the sum of $1500.00,
the party of the first part granted, bargained, sold,
112 aliened, remised, released, conveyed and confirmed all
the undivided one-fourth part of all the Rancho "Corte Madera del Presidio," situate in the County of Marin, in the State of California, which is not included in the survey of said rancho which was made under instructions from the U. S. Surveyor-General for the State of California by R. C. Matthewson, Deputy Surveyor, in October, 1858, and approved by J. W. Mandeville, United States Surveyor-General for California, September 19th, 1859, said approved survey containing 4460.24 acres of land. The said rancho being the same which was granted to Juan Reed by the Mexican Government.

Duly acknowledged by the party of the first part July 29th, 1868, recorded August 27th, 1868, in the County Recorder's Office of Marin County in Book "G" of Deeds at pages 116 and 117

(EXHIBIT "P.")

Deed from John J. Reed of the County of Marin, State of California, the party of the first part, to Hugh A. Boyle of the City and County of San Francisco, the party of the second part, dated May 11th, 1869, whereby in consideration of the sum of $5.00 the party of the first part granted, bargained and sold, conveyed and confirmed all the right, title and interest of the party of the first part of, in and to all that certain rancho or tract of land situate in the County of Marin, State of California, known as the "Rancho Corte de Madera del Presidio," which is not included in the survey of said rancho made under instructions from the United States Surveyor-General for California by R. C. Matthewson, Deputy Surveyor, in October, 1858, approved by J. W. Mandeville, U. S. Surveyor-General for California, September 19th, 1859, containing 4460.24-100 acres, said rancho being the same granted to Juan Reed by the Mexican Government. It being expressly understood that this deed conveys no interest in the 4460.24-100 acres embraced in the above-named survey.

Duly acknowledged by the party of the first part May 12th, 1869, recorded February 6th, 1871, in the County Re-
113 corder's Office of Marin County, in Book "J" of Deeds at pages 9 and 10.

(EXHIBIT "Q.")

Deed from Hilarita Reed (spinster) of the City and County of San Francisco, State of California, the party of the first part, to Hugh A. Boyle of the same place, party of the second part, dated the 24th day of May, 1869, whereby in consideration of the sum of $5.00, the party of the first part granted, bargained and sold, conveyed and confirmed all the right, title and interest of the party of the first part of, in and to all that certain rancho or tract of land situate in the County of Marin, State of California, known as the "Rancho Corte de Madera del Presidio," which is not included in the survey of said rancho made under instructions from the United States Surveyor-General for California, by R. C. Matthewson, Deputy Surveyor, in October, 1858, approved by J. W. Mandeville, U. S. Surveyor-General for California, September 19, 1859, containing 4460.24-100 acres, said rancho being the same granted to Juan Reed by the Mexican Government. It being expressly understood that this deed conveys no interest in the 4460.24-100 acres embraced in the above-named survey.

Duly acknowledged by the party of the first part June 3rd,

1869, recorded February 6th, 1871, in the County Recorder's Office of Marin County, in Book "J" of Deeds at pages 11 and 12.

(EXHIBIT "R.")

Deed from Thomas B. Deffebach and Inez Reid Deffebach of the County of Marin, State of California, Hugh A. Boyle and Maria Garcia de Boyle, his wife, Thomas B. Valentine and H. C. Newhall of the City and County of San Francisco, parties of the first part, to Julius C. McCeney of the City and County of San Francisco, State aforesaid, dated the 1st day of February, 1871, whereby in consideration of the sum of $5.00 the parties of the first part granted, bargained and sold all that certain tract, piece or parcel of land situate, lying and
114 being in the County of Marin, State of California, described as follows, to wit: Beginning at a post marked C. M. P. 181, distant 20 chains north of corner, sections 28, 29, 32 and 33, in township 1 north, range 6 west, Mount Diablo Meridian, from which a madrona tree four feet in diameter marked B. T. C. M. P. 181 bears south 24 degrees east 87 links distant; said post is station 181 on R. C. Matthewson's survey of the Rancho Corte Madera del Presidio, as approved by the United States Surveyor-General for the State of California, September 19th, 1859; thence along the line of said Matthewson's survey east 6.38 chains to station, a post in stone mound, from which an oak 22 inches in diameter bears N. 17.½ degrees W. 33 chains, and said madrona tree bears S. 82.½ degrees W.; thence leaving said Mathewson's survey, north 9 degrees west 29.90 chains to station; thence north 70.¾ degrees west 10.70 chains to station post marked "A"; thence south 73.¾ degrees west, 16.65 chains to station in center of the creek known as "Arroyo de Corte Madera del Presidio"; thence down the center of soid creek, with the meanders thereof, according to William J. Lewis' survey of the Rancho Saucelito, approved October 2nd, 1860, by the said Surveyor-General, south 39.¾ degrees east 1.50 chains to station 11 of said Lewis' survey; thence south 4.¼ degrees east, 10.74 chains to station 12 of said Lewis' survey; thence south 35 degrees east 10.30 chains to station 14 of said Lewis' survey; thence south 71.¼ degrees east 10.78 chains to station 15 of said Lewis' survey; thence north 70.¼ degrees east 3.90 chains to station 16 of said Lewis' survey; thence south 33.¾ degrees east 0.40 chains to station in center of said arroyo and on line between sections 28 and 29, township 1 north, range 6 west, 17.55 chains north of corner, sec-

tions 28, 29, 32 and 33; thence leaving said creek and survey, north 2.45 chains, to the post marked C. M. P. 181, the place of beginning, containing 80.24 acres of land.

Duly acknowledged by the parties of the first part February 2nd, 1871, recorded February 6, 1871, in the Marin County Recorder's Office in Book "J" of Deeds at pages 24, 25, 26 and 27.

(EXHIBIT "S.")

Deed from Julius C. McCeney of the City and County of San Francisco, State of California, the party of the first part,
115 to Samuel R. Throckmorton of the same place, the party of the second part, dated January 19th, 1875, whereby the party of the first part for and in consideration of the sum of $1.00 granted, bargained and sold all that certain tract, piece or parcel of land which is described in the foregoing deed from Thomas B. Deffebach and others to Julius C. McCeney, dated February the 1st, 1871, and recorded in Book "J" of Deeds at page 24.

Duly acknowledged by Robert George as a subscribing witness May 14th, 1875, recorded February 24th, 1876, in the Recorder's Office of Marin County in Book "J" of Deeds at pages 206, 207 and 208.

Field Notes of a Survey of a Tract of Land Situated in Marin County, California, and Surveyed for Samuel R. Throckmorton, Esquire, by G. F. Allardt, Surveyor, on January 7th, 1871.

(See Annexed Plat.)

Run by the True Meridian—Magnetic Variation 16 Degrees 20 Minutes East.

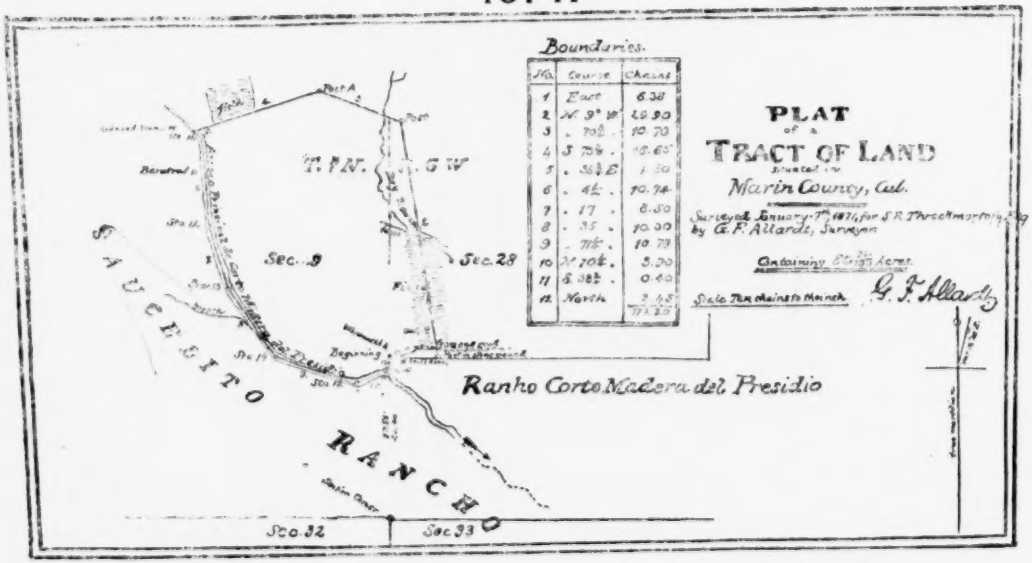
Beginning at a post marked C. M. P. 181, distant 20 chains north of corner sections 28, 29, 32 and 33, in township 1 north, range 6 west, Mount Diablo meridian, from which a madrona tree, 4 feet in diameter, marked B. T. C. M. P. 181, bears S. 24 degrees E. 87 links distant. Said post is station 181 on R. C. Matthewson's survey of the Rancho "Corte Madera del Presidio," as approved by the U. S. Surveyor-General, September 19th, 1859.

Thence along the line of said Matthewson's survey:

No.	Course.	Chains.	
1.	East.	1.00	Wormouth's house is 5 links to left;
		2.10	cross fence, course N. 60 degrees E.;

		6.38	to station—set a post in stone mound from which an oak 22 inches in diameter bears N. 17.½ W. 3.33 chains and said madrona
116			tree bears S. 82.½ W. Thence, leaving said Matthewson's Survey and over slightly rolling ground—
2.	N. 9 deg. W.	1.00	cross fence course E. and W..
		1.20	cross road course E. and W. and enter ploughed field;
		15.36	cross fence course N. 71 W. 8. 71 E. and leave field 15.58 cross dry ravine, course S. 70 E. 29.90 to station; set a post and descend;
3.	N. 70.¾ deg. W.	2.10	cross same ravine course southerly and ascend steep slope;
		10.70	to station on top of grassy spur—set a post marked A and ascend—
4.	S. 73.¾ W.	8.50	to foot of steep slope opposite corner of field;
		14.20	cross fence and bars, Co. N. 15. W. 16.50 to redwood stump 27 in. diam. (which I marked W.) on left bank of the Arroyo "Principal de Corte Madera del Presidio";
		16.65	to sta. in center of said creek; thence down the center of said creek, with the meanders thereof, according to Wm. J. Lewis' survey of the Rancho Saucelito; surveyed in March, 1858, and approved by the U. S. Surveyor-General, October 2nd, 1860;
5.	S. 39.¾ E.	1.50	to station S. 11, of said Lewis' Survey.
6.	S. 4.½ E.	10.74	to station S. 12, of said Lewis' Survey.
7.	S. 17 E.	8.50	to station S. 13, of said Lewis' Survey.
8.	S. 35 E.	10.30	to station S. 14, of said Lewis' Survey (at 5 chs. to junction of

101 A


Boundaries.
No. Course Chains
1 East 6.38
2 N. 9° W. 48.90
3 . 70½ . 10.70
4 S. 75¾ . 18.65
5 . 36½ E. 1.50
6 . 4½ . 70.74
7 . 17 . 6.50
8 . 35 . 70.90
9 . 77½ . 10.79
10 N. 70½ . 5.00
11 S. 38½ . 0.40
12 North 2.45
773.25
PLAT
of a
TRACT OF LAND
situated in
Marin County, Cal.
Surveyed January 7th 1871 for J. R. Throckmorton
by G. F. Allardt, Surveyor
Containing 6 93/100 Acres.
Scale Ten chains to Inch.
G. F. Allardt
T. 1 N.
R. 6 W.
Sec. 9
Sec. 28
Sec. 32
Sec. 33
Beginning
SAUCELITO
RANCHO
Rancho Corte Madera del Presidio

16905

117 right branch of said Arroyo bears west);

9. S. 71.¼ E. 10.78 to station S. 15, of said Lewis' Survey.

10. N. 70.¼ E. 3.90 to station S. 16 of said Lewis' Survey.

11. S. 33.¾ E. 0.40 to station in center of said creek (arroyo) and on line between sections 28 and 29, T. 1 N., R. 6 W., 17.55 chains north of corner sections 28, 29, 32 and 33; thence leaving said creek and survey;

12. N 2.45 to the post C. M. P. 181, the place of beginning. Containing 80.24 acres.

G. F. ALLARDT,
Surveyor.

San Francisco, Jan'y 10, 1870.

[Map.]
See Original Transcript.

The foregoing are the field notes and map of the survey which is referred to in the deed made from Thomas B. Deffebach and Inez Reed Deffebach, Hugh A. Boyle, Thomas B. Valentine and H. C. Newhall to Julius McCeney.

Feb. 1st, 1871.

THOS. B. DEFFEBACH.
INEZ REED DEFFEBACH.
S. R. THROCKMORTON.

Duly acknowledged by Thomas B. Deffebach and Inez Reed Deffebach, his wife, and Samuel R. Throckmorton, February 2nd, 1871, before James G. Carson, a notary public in and for the City and County of San Francisco, recorded in the office of the County Recorder of Marin County, February 6th, 1871, in Liber "J" of deeds at pages 30, 31 and 32.

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118 (EXHIBIT "U.")

In the Circuit Court of the United States for the Northern District of California, Tenth Circuit.

JAMES CLINTON BOLTON,

Plaintiff,

vs.

JOHN L. VAN REYNEGAN, JONATHAN BICKERSTAFF, R. S. BROWN, DAVID CLINGAN, JAMES CUMMINGS, PETER DOLAN, MICHAEL DOWD, MART TIERNEY, PETER GARDNER, LOUIS DENOS, FRANCISCO ANGENETT, JOSE ALBORUOS, MARY KING, GEORGE HANSON, PHILIP RAY, EDWARD WORMOUTH, JOHN DOE, RICHARD ROE, JOHN BLACK, PETER BLUE AND GEO. WHITE,

Defendants.

The plaintiff, James Clinton Bolton, by Brooks & Whitney, his attorneys, complains of John L. Van Reynegan, Jonathan Bickerstaff, R. S. Brown, David Clingan, James Cummings, Peter Dolan, Michael Dowd, Mert Tierney, Peter Gardner, Louis Denos, Francisco Angenett, Jose Alborunos, Mary King, George Hanson, Philip Ray, Edward Wormouth, John Doe, Richard Roe, John Black, Peter Blue and George White, defendants, the last five names being fictitious names intended to designate certain defendants whose true names are unknown to plaintiff, and whose true names, when discovered, he prays, may be here inserted.

And for cause of action he alleges:

That the plaintiff is a citizen and resident of the State of New York, and the defendants are citizens and residents of the State of California.

That on the 12th day of August, 1865, the plaintiff was, and ever since has been, the owner in fee simple absolute and entitled to the possession of that certain tract of land situate, lying and being in the County of Marin, in said State of California, bounded and described as follows, to wit:

119 Commencing at the westerly corner of the solar, on the creek called Corte de Madera del Presidio, near the old sawmill at the foot of the hills and in the edge of the forest of redwoods called Corte de Madera del Presidio; thence running north 28 degrees east 162 chains to a laurel 24 inches in diameter, marked P. Q. 99, a point in the survey of the Rancho Punta de Quentin on the Arroyo Holon at Corte de Madera de San Pablo; thence following down the Arroyo Holon, north 26.¾ degrees east 15 chains 10 links to a laurel 36 inches in diameter, marked P. Q. 98; thence north 17.½ degrees east 9

chains 55 links to a redwood marked P. Q. 97; thence north 33 degrees east 20 chains 20 links to the mouth of the Arroyo Holon; thence along the border of the marsh of San Francisco Bay north 86 degrees east 5 chains 60 links, thence south 35.¼ degrees east 6 chains 80 links; south 46.½ degrees west 7 chains; south 86.½ degrees east 9 chains 60 links; north 79 degrees east 13 chains 80 links; south 18 degrees west 16 chains; south 69 degrees east 17 chains 10 links; south 60.½ degrees east 10 chains 20 links; south 1.¼ degrees east 6 chains 70 links; south 42.¼ degrees west 6 chains; south 76 degrees west 13 chains 90 links; south 30.¼ degrees west 14 chains 20 links; south 32 degrees east 5 chains 70 links; south 80.½ degrees east 37 chains; south 64.¼ degrees east 6 chains 60 links; south 69.½ degrees east 13 chains; south 52.¾ east 11 chains 80 links; south 24.¼ degrees east 7 chains; north 72 degrees east 5 chains; south 57 degrees east 4 chains; south 40.¾ degrees west 12 chains; south 10.¾ degrees east 25 chains 79 links to a post marked C. M. P. No. 1, then, leaving the salt marsh, south 21 chains 30 links; west 40 chains; south 20 chains; west 60 chains; south 20 chains; west 40 chains; south 2 chains 45 links to the Arroyo Corte de Madera del Presidio; thence down said Arroyo south 33.¾ degrees east 5 chains 80 links; south 59.¼ degrees east 6 chains 40 links; south 41.¾ degrees east 24 chains 10 links to a laurel on the bank of the arroyo 24 inches in diameter marked C. M. P. 177 S 19, thence S. 9.¼ degrees west 7 chains 15 links to the Punta de Sausal; thence north 59.¾ degrees west 83 chains 63 links to the point of commencement—containing 2038.56 acres; being a
120 portion of the Rancho Corte de Madera del Presidio, which was granted to Juan Reid by the Mexican Government, and of which juridical possession was delivered to him. The claim for which rancho under said grant was duly presented to the Board of Commissioners for the settlement of private land claims in the State of California by the widow and heirs of the said Juan Reid, and which was duly confirmed by said Board and the District Court of the United States for the Northern District of California, and for which no patent has as yet been issued.

That being so, the owner and entitled to the possession of said tract of land, the said defendants on the 13th day of August, 1865, unlawfully and wrongfully entered upon the same and ousted the plaintiff therefrom, and from thence hitherto have unlawfully and wrongfully withheld and still unlawfully and wrongfully withhold and detain the posses-

sion thereof from the plaintiff, whereby he has suffered damages to the amount of $10,000.00.

Wherefore, the plaintiff prays judgment against the said defendants for the restitution of said tract of land and for $10,000.00 damages, besides costs of suit.

BROOKS & WHITNEY,
Attorneys for Plaintiff.

Endorsed: Filed Oct. 30th, 1865.

GEO. C. GORHAM,
Clerk.

Pr. W. F. HUERTIS,
Deputy Clerk.

I, Lorenzo S. Sawyer, Clerk of the Circuit Court of the United States for the District of California, do hereby certify the foregoing to be a true, full and correct copy of the complaint in the therein entitled cause.

Attest my hand and seal of said Circuit Court this 15th day of February, A. D. 1881.

[Seal.] L. S. B. SAWYER,
Clerk.

By J. F. O'BEIRNE,
Deputy Clerk.

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121 (EXHIBIT "V.")

In the United States Circuit Court, Ninth Judicial Circuit, District of California.

James C. Bolton,
vs.
John L. Van Reynegan, Jonathan Bickerstaff, et al. } No. 190.

This cause having come on regularly for trial in its place upon the calendar, on the 25th day of August, 1870, B. S. Brooks, Esq., appearing as counsel for plaintiff and J. M. McShafter and E. L. Gould, Esqs., for defendants, and a trial by jury having been expressly waived by a stipulation in writing signed by counsel for the plaintiff and the defendants and filed with the Clerk of said Court, the cause was tried before the Court sitting without a jury as to all of the defendants, excepting Peter Dolan and Michael Dowd, as to which said last-named defendants said cause was discontinued, and after hearing testimony, oral and documentary, and arguments of counsel for the plaintiff and the defendants, said cause was submitted to the Court for consideration and decision. And after

due deliberation, and the Court having filed its findings thereon, it is considered by the Court that said plaintiff do have and recover of and from the defendants, John L. Van Reynegan, Jonathan Bickerstaff, R. L. Brown, David Clingan, James Cummings, Peter Gardner, Louis Denos, Francisco Angenette, Mart Tierney, Edward Wormouth and Victor Garnow, the possession of those certain lands and premises situate in the County of Marin, State of California, and described in the amended complaint herein as being part of the Rancho Corte Madera del Presidio or Reed Ranch, bounded and described as follows, to wit: Commencing at station 181 of the survey of R. C. Mathewson of the Rancho Corte Madera del Presidio, running thence north 8.½ degrees east 152 chains to a laurel 24 inches in diameter marked P. Q. 99, a point in the survey of the Rancho Punta de Quentin on the Arroyo Holon at the Corte Madera de San Pablo, thence following down the
122 Arroyo Holon north 26.¾ degrees east 15 chains 10 links to a laurel 36 inches in diameter marked P. Q. 98; thence north 17.½ degrees east 9 chains 55 links to a redwood marked P. Q. 97; thence north 33 degrees east 20 chains 20 links to the mouth of the Arroyo Holon; thence along the border of the marsh of San Francisco Bay north 86 degrees east 5 chains 60 links, thence south 35.¼ degrees east 6 chains 80 links; south 46.½ degrees west 7 chains; south 86.½ degrees east 9 chains 60 links; north 79 degrees east 13 chains 80 links; south 18 degrees west 16 chains; south 69 degrees east 17 chains 10 links; south 60.½ degrees east 10 chains 20 links; south 1.¼ degrees east 6 chains 70 links; south 42.½ degrees west 6 chains; south 76 degrees west 13 chains 90 links; south 30.¼ degrees west 14 chains 20 links; south 32 degrees east 5 chains 70 links; south 80.½ degrees east 37 chains; south 64.¼ degrees east 6 chains 60 links; south 69.¼ degrees east 13 chains; south 52.¾ degrees east 11 chains 80 links; south 24.½ degrees east 7 chains; north 72 degrees east 5 chains; south 57 degrees east 4 chains; south 40.¾ degrees west 12 chains; south 10.¾ degrees east 25 chains 79 links to a post marked C. M. P. No. 1, thence leaving the salt marsh, south 21 chains 30 links; west 40 chains; south 20 chains; west 60 chains; south 20 chains; west 40 chains to said station 181, the point of commencement. Containing 1500 acres, more or less, together with said plaintiff's costs and disbursements incurred in this action amounting to the sum of $536.44.

And that said plaintiff have and recover of and from said defendant R. S. Brown the sum of $426.00 for his damages for

the detention of said lands and from the said defendant Francisco Angenetti the sum of $450.00 for damages for the detention of said land and from said defendant Peter Gardner the sum of $496.00 damages for the detention of said land.

And that as to the said defendants George Hansom and Mary King that said defendants go thence without day.

Judgment entered this 26th day of July, A. D. 1871.

L. S. B. SAWYER,
Clerk.

123 I, Lorenzo S. B. Sawyer, Clerk of the Circuit Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the judgment in the therein entitled cause.

Attest my hand and seal of said Circuit Court this 5th day of February, A. D. 1881.

[Seal.] L. S. B. SAWYER,
Clerk.

By J. F. O'BEIRNE,
Deputy Clerk.

(EXHIBIT "W.")

In the Circuit Court of the United States of the Ninth Judicial Circuit District of California.

The President of the United States of America to the Marshal of the United States of America, District of California. Greeting:

Whereas James Clinton Bolton, plaintiff, on the 26th day of July, A. D. 1871, recovered a judgment in said above-named Court against John L. Van Reynegan, Jonathan Bickerstaff, R. S. Brown, David Clingan, James Cummings, Peter Gardner, Louis Denos, Francisco Angenetti, Mart Tierney, Edward Wormouth and Victor Garnow, for the possession of certain premises more particularly described hereinafter together with damages for the unlawful detention of said premises and for costs and disbursements in this action expended.

And whereas, the judgment roll in which said James Clinton Bolton is plaintiff and John L. Van Reynegan, Jonathan Bickerstaff, R. S. Brown, David Clingan, James Cummings, Peter Gardner, Louis Denos, Francisco Angenetti, Mart Tierney, Edward Wormouth and Victor Garnow are defendants, has been filed in the Clerk's office of said Court in the City and County of San Francisco, and the said judgment has been docketed in said Clerk's office.

Now, therefore, you, the said Marshal, are hereby com-

manded and required to place the said James Clinton Bolton in quiet and peaceable possession of the lands and
124 premises in said judgment described as follows, viz: All and singular the possession of the entire premises described in the amended complaint, filed February 11th, A. D. 1871. Commencing at station 181 of the survey of R. C. Matthewson of the Rancho Corte Madera del Presidio, running thence north 8.½ degrees east 152 chains to a laurel 24 inches in diameter, marked P. Q. 99, a point in the survey of the Rancho Punta de Quentin on the Arroyo Holon at the Corte Madera de San Pablo; thence following down the Arroyo Holon, north 26.¾ degrees east 15 chains 10 links to a laurel 36 inches in diameter, marked P. Q. 98; thence north 17.½ degrees east 9 chains to a redwood marked P. Q. 97; thence north 33 degrees east 20 chains 20 links to the mouth of the Arroyo Holon; thence along the border of the marsh of San Francisco Bay north 86 degrees east 5 chains 60 links, thence south 35.¼ degrees east 6 chains 80 links; south 46.½ degrees west 7 chains; south 86.½ degrees east 9 chains 60 links; north 79 degrees east 13 chains 80 links; south 18 degrees west 16 chains; south 69 degrees east 17 chains 10 links; south 60.½ degrees east 10 chains 20 links; south 1.¼ degrees east 6 chains 70 links; south 42.½ degrees west 6 chains; south 76 degrees west 13 chains.90 links; south 30.¼ degrees west 14 chains 20 links; south 32 degrees east 5 chains 70 links; south 80.½ degrees east 37 chains; south 64.¼ degrees east 6 chains 60 links; south 69.½ degrees east 13 chains; south 52.¾ degrees east 11 chains 80 links; south 24.½ degrees east 7 chains; north 72 degrees east 5 chains; south 57 degrees east 4 chains; south 40.¾ degrees west 12 chains; south 10.¾ degrees east 25 chains 79 links to a post marked C. M. P. No. 1, thence leaving the salt marsh, south 21 chains 30 links; west 40 chains; south 20 chains; west 60 chains; south 20 chains; west 40 chains to said station 181, the point of commencement. Containing 1500 acres, more or less.

And these are further to command you, the said Marshal, that you cause to be made by distress and sale of the goods and chattels of the defendant R. S. Brown the sum of $426.00 for his damages for the detention of said lands; by distress and sale of the goods and chattels of the defendant
125 Francisco Angenetti the sum of $450.00 damages for the detention of said lands; and by distress and sale of the goods and chattels of the defendant Peter Gardner the sum of $496.00 damages for the detention of said land. And

also the further sum of $536.44, plaintiff's costs and disbursements in this action, and all costs that may accrue; and of this Writ make legal service and return on the 30th day after your receipt thereof.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this the 25th day of September in the year of our Lord 1871, and of the Independence of the United States of America the 96th.

Attest my hand and the seal of said Circuit Court at San Francisco in said Circuit and District the day and year last above written.

[Seal.] L. S. B. SAWYER,
Clerk.

By J. F. O'BEIRNE,
Deputy Clerk.

U. S. MARSHAL'S OFFICE,
District of California.

I hereby certify that I received a Writ of Restitution issued from the U. S. Circuit Court for the District of California, on a judgment rendered in favor of Plaintiff's at the suit of James Clinton Bolton vs. John L. Van Reynegan et al., on the 26th day of September, A. D. 1871; and served the same on John L. Van Reynegan, Jonathan Bicherstaff, R. L. Brown, David Clingan, James Cummings, and on Mrs. P. Gardner, wife of Peter Gardner, Louis Denos, Francisco Angenetti, and on the widow of Mart Tierney, Edward Tierney, Edward Wormouth and Victor Garnow. And on the 10th day of October, A. D. 1871, collected from Francisco Angenetti the sum of $602.00, the amount of the judgment and accruing costs due from him. And on the 23rd day of October, A. D. 1871, collected the sum of $956.90, the amount of the General Judgment and for accruing costs.

126 In regard to the execution against R. S. Brown and Peter Gardner I return the writ unsatisfied. I placed the plaintiff in quiet and peaceable possession of the entire premises described in the writ, H. C. Newhall, T. B. Valentine, H. A. Boyle and Inez Reed Deffebach and T. B. Deffebach receiving possession thereof for plaintiff as successors in interest. WM. GOVERNEUR MORRIS,
U. S. Marshal.

A. C. TAYLOR,
Deputy.

San Francisco, November 7th, 1871.

OFFICE OF THE MARSHAL
for the District of California.

In conformity with an order of Court to me this day directed, the foregoing return is hereby amended as to state that where the foregoing was executed it was not extended to the piece of ground occupied by the house of Peter Gardner near the line of the marsh on San Francisco Bay at the time of execution thereof, it not being able definitely to ascertain whether said house was embraced within the boundary described in said writ.

Dated San Francisco, this 17th day of May, A. D. 1871.

WM. GOUVENEUR MORRIS,
U. S. Marshal.

By A. C. Taylor, Deputy.

Endorsed: Filed May 17th, 1872.

L. S. B. SAWYER,
Clerk.

By J. F. O'BEIRNE,
Deputy Clerk.

I, Lorenzo S. B. Sawyer, Clerk of the Circuit Court of the United States for the District of California, do hereby certify the foregoing to be a full, true and correct copy of the Writ of Possession in the therein entitled cause.

127 Attest my hand and seal of said Circuit Court this 5th day of February, A. D. 1881.

[Seal.] L. S. B. SAWYER,
Clerk.

J. F. O'BEIRNE,
Deputy Clerk.

(EXHIBIT "X.")

In the District Court of the 22nd Judicial District, in and for the County of Marin.

Samuel R. Throckmorton,
Plaintiff,

vs.

Ebenezer Wormouth,
Defendant.

Samuel R. Throckmorton, plaintiff in the above-entitled action, complains against Ebenezer Wormouth, defendant

therein, and for cause of action against the said defendant alleges as follows:

That, to-wit: On the 26th day of July, 1871, this plaintiff was, has ever since been and now is the owner in fee, and possessed and entitled to the possession of all and singular the following described real property, to-wit: All that certain piece or parcel of land situate, lying and being in the County of Marin, State of California, bounded and described as follows: Beginning at a post marked "C. M. P. 181," in the Mathewson survey of the Rancho Corte Madera del Presidio, made in 1858, and filed in the United States Surveyor General's office for California, from which post a madrona tree four feet in diameter marked "B. T. C. M. P. 181" bears south 24 degrees east 87 links distant, thence according to the true meridian, the magnetic variation being 16 degrees 30 minutes east, as follows: East 2.12 chains to E. Wormouth's fence; thence along his fence and including the same north 60 degrees east 2.23 chains to south post of a gate across a road (course of road east and west, north 15½ degrees east 1.11 chains to angle in fence, north 60 degrees west 3.53 chains to angle in fence, north 8 degrees west 2.36 chains to a line laid down on the plat of the official survey of the Rancho Corte Madera del Presidio, as surveyed by Leander Ransom, and now on file in the United States Surveyor General's office for California, which line runs north 9 degrees east from said post "C. M. P. 181," and thence south 9 degrees west 6.34 hains along said line to said post "C. M. P. 181," the place of beginning.

That the said plaintiff being so as aforesaid seized and
128 possessed and entitled to the possession of the aforesaid real property, the said defendant afterwards, to-wit, on the 27th day of July, 1871, wrongfully entered into and upon the said land and premises and ousted the plaintiff therefrom, and from thence hitherto has and still unlawfully detains the same and every part thereof from the plaintiff, to the damage of the plaintiff of $5000.00. That the use and occupation of said land and premises has during the aforesaid time been, and is of the value of one hundred dollars per annum.

Wherefore, plaintiff demands judgment against the said defendant for the restitution and recovery of the possession of the aforesaid real property with damages for the detention thereof by the defendant of $5000.00, and for the value of the use and occupation of the same to the amount of $5000.00 and costs of this action.

WM. IRVINE,
Plaintiff's Attorney.

City and County of San Francisco—ss.

Samuel R. Throckmorton being duly sworn deposes that he is the plaintiff in the foregoing complaint, that he has read the said complaint and knows the contents thereof, and that the same is true of his own knowledge, excepting the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

SAMUEL R. THROCKMORTON.

Sworn to before me this 24th day of July, 1876.

[Seal.] JAMES L. KING,
Notary Public.

Endorsed: Complaint filed July 24, 1876.

VAL. D. DOUB,
Clerk.

WM. IRVINE,
Plff. Atty.

County Clerk's Office,
State of California, County of Marin.

I, Geo. W. Davis, County Clerk of the County of Marin, State of California, and Clerk of the Superior Court, do
129 hereby certify that I have compared the foregoing copy of complaint in the case of Samuel R. Throckmorton vs. Ebenezer Wormouth and of endorsements thereupon, with the original records of the same remaining in this office, and that the same is a correct copy thereof, and of the whole of said original record.

Witness my hand and the seal of said Court, this 16th day of February, 1881.

[Seal.] GEO. W. DAVIS,
Clerk.

By DANIEL T. TAYLOR,
Deputy Clerk.

[Map.]
See Original Transcript.

DECISION OF U. S. REGISTER AND RECEIVER.

U. S. Land Office,
San Francisco, Cal'a.
Aug. 11, 1885.

S. R. Throckmorton
vs.
Ebenezer Wormouth.

The records of this office show that S. R. Throckmorton, on October 20, 1880, made application to purchase, under 7th section Act of July 23, 1866, lot 3, section 28, and lots 2 and 3 and southeast ¼ of northeast ¼ section 29, T. 1 N., R. 6 W., M. D. M.

Ebenezer Wormouth filed D. S. No. 10661 December 18, 1874, alleging settlement March 1, 1859, for lot 3, section 28, and lot 3, section 29, same township and range.

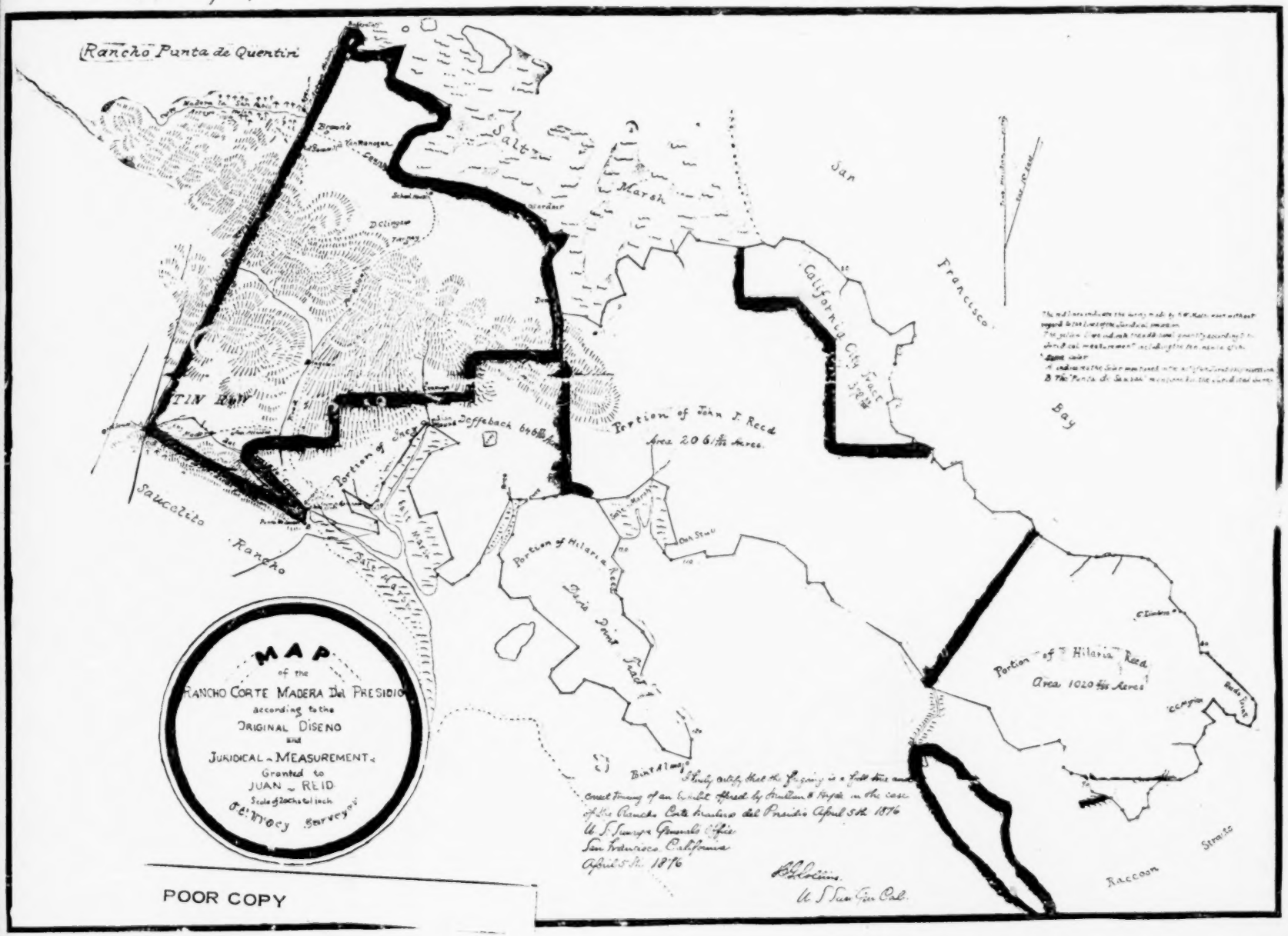
Said filing was decided to be premature and illegal by letter of Hon. Commissioner G. L. O. of Aug. 31, 1880—"G" in case of R. S. Brown.

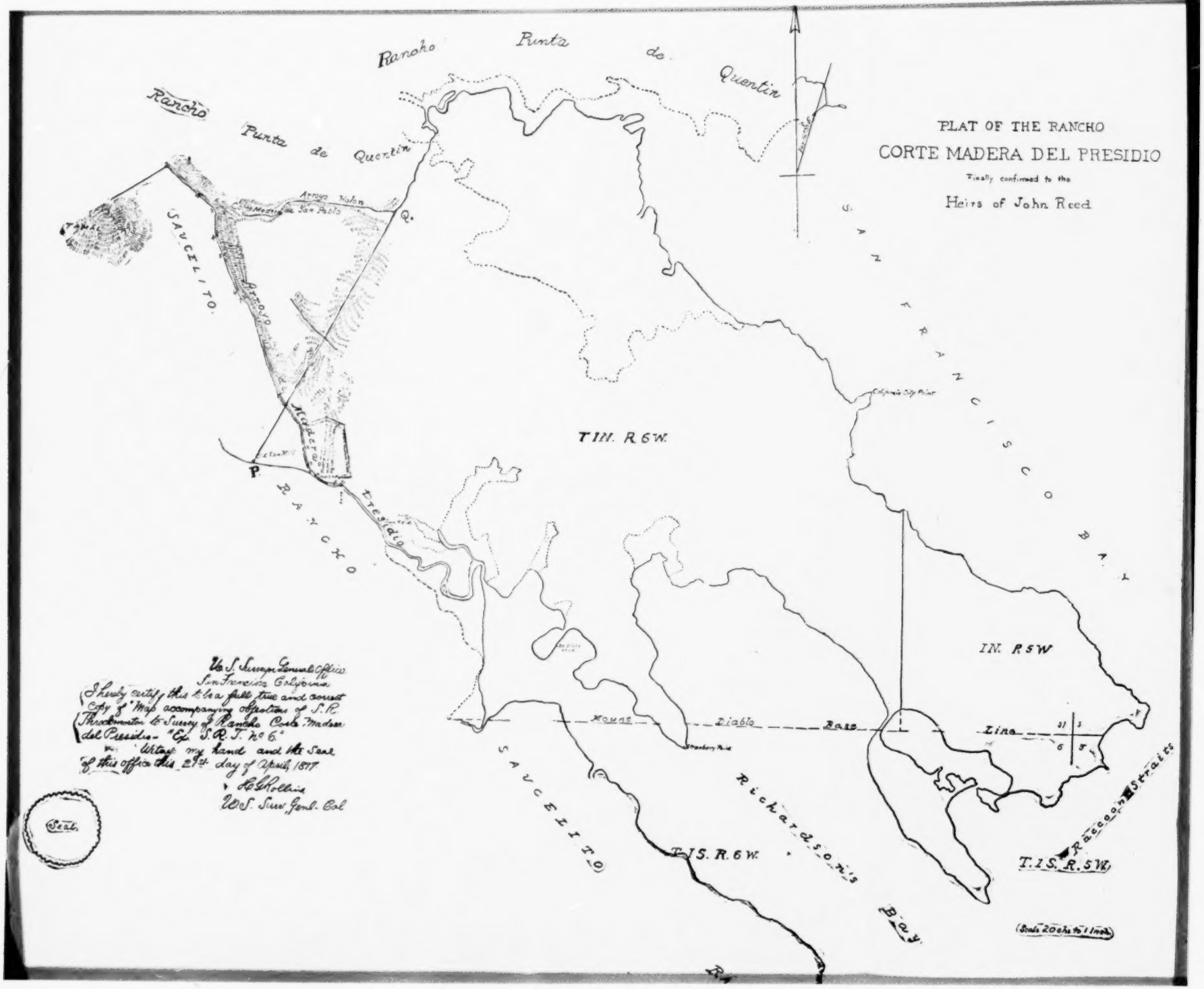
Said Wormouth on September 14, 1880, filed D. S. No. 15517, alleging settlement, March 5, 1859, claiming the same land as in his previous filing. On May 20, 1881, said Wormouth made H. E. No. 4415 upon the same land. Town-
130 ship plat filed December 5, 1874. Sections 16, 17, 20, 21, 28 and 29, suspended March 1, 1875. Suspension removed except as to lots 2 and 3, section 28, and lots 2 and 3 and southeast ¼ of northeast ¼ section 29, August 12, 1875, by letter of Surv'r Gen'l for California of August 7, 1875.

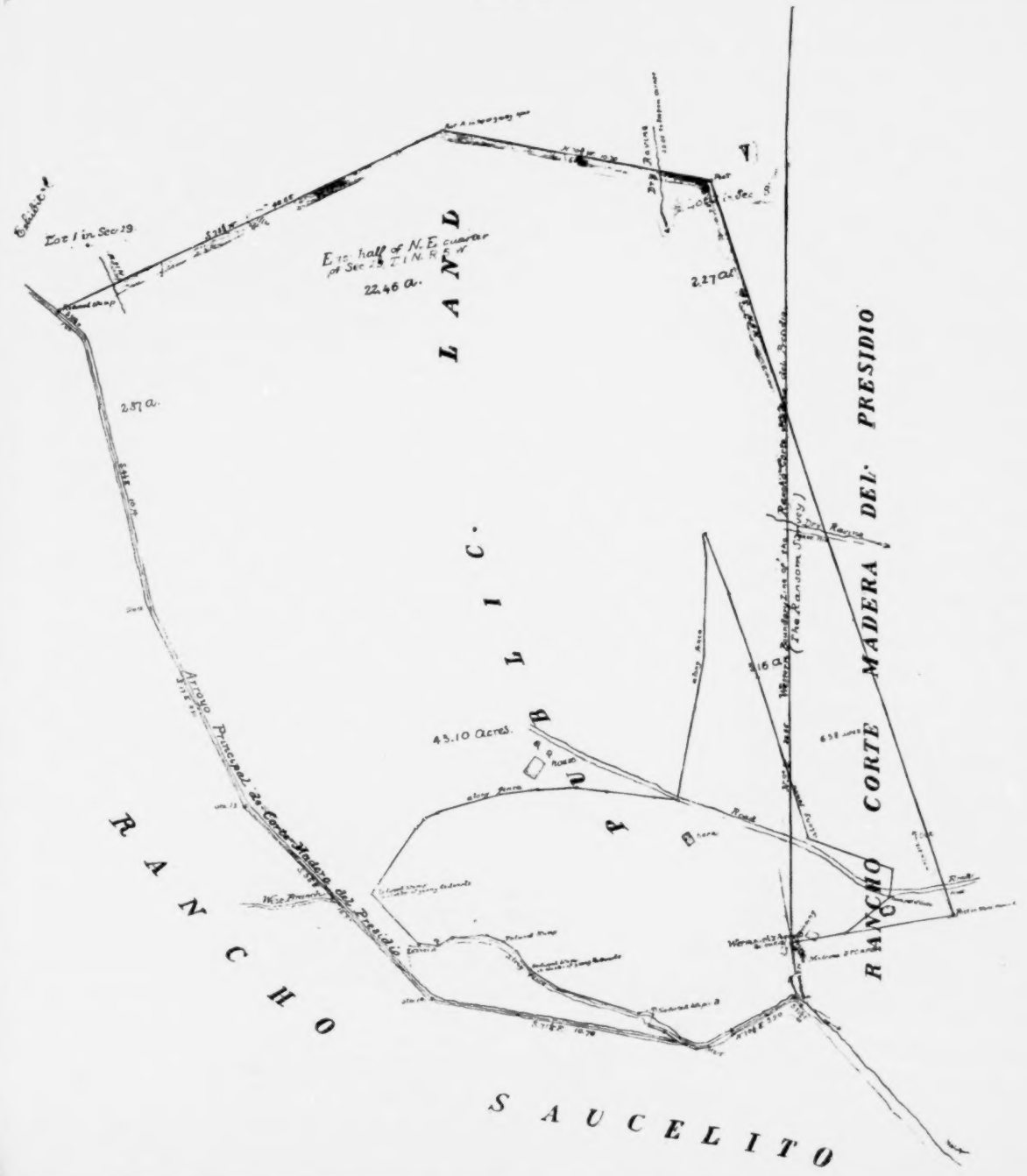
Plat withdrawn from office August 13, 1875, and returned and filed in this office August 2, 1880. The testimony shows that in August, 1865, the heirs of Reed, the Mexican Grantee of the Rancho "El Corte de Madera del Presidio," made a conveyance to one Bolton of one undivided half interest in all land in the said Rancho outside of the Mathewson survey of the same; the consideration being $1.00 and other considera tions.

In June, 1866, Throckmorton purchased from a party holding under Bolton an undivided one-fourth of said rancho, outside of the Mathewson survey. None of the deeds prior to 1866 in the chain of title from Bolton to Throckmorton conveyed any land by specific boundaries or any land but an undivided interest in such land as was included within the "El Corte de Madera del Presidio" outside of the lines of the Mathewson survey.

Ex. No. 2 to Stacys Deposition


Rancho Punta de Quentin
Saltz
Marsh
San
Francisco
Bay
California City Tract
Portion of John T. Reed
Area 206 1/100 Acres
Portion of Hilaria Reed
Area 1020 100 Acres
Saucelito
Rancho
Tin Roof
Doffelbach
Portion of Salt Marsh
Portion of Hilaria Reed
State Drainage Canal
Raccoon
Strait
MAP
of the
RANCHO CORTE MADERA Del PRESIDIO
according to the
ORIGINAL DISENO
and
JURIDICAL MEASUREMENT
Granted to
JUAN REID
Scale of 2 Chs to 1 inch
E. Stacy Surveyor
I Duly certify that the Foregoing is a full true and
Correct Survey of an Exhibit offered by Shelton & Hoyt in the case
of the Rancho Corte Madera del Presidio April 5th 1876
U S Surveyor Generals Office
San Francisco California
April 5th 1876
B Gleeson
U S Surv Gen Cal
The red lines indicate the survey made by W. Reid, some without regard to true bearings and distances
The yellow lines indicate the old lines (some) according to Juridical measurement including the marsh lands
Blue color
A indicates the Clear and Level land
B The Points de Sal are included in the Juridical survey
POOR COPY


PLAT OF THE RANCHO
CORTE MADERA DEL PRESIDIO
Finally confirmed to the
Heirs of John Reed
Rancho Punta de Quentin
Rancho Punta de Quentin
Arroyo Nolan
Arroyo San Pedro
SAUCELITO
Arroyo
Arroyo
Presidio
T1N. R6W.
SAN FRANCISCO BAY
IN. R5W
Mount Diablo Base
Line
SAUCELITO
Richardson's Bay
T.1S. R.6W.
T.1S. R.5W.
Raccoon Straits
(Scale 20 chs to 1 inch)
U.S. Surveyor General's Office
San Francisco California
I hereby certify this to be a full true and correct
Copy of "Map accompanying objections of S.R.
Throckmorton to Survey of Rancho Corte Madera
del Presidio - "Ex. S.R.T. No 6"
Witness my hand and the Seal
of this office this 21st day of April 1877
H.G. Hollins
U.S. Surv. Gen'l. Cal
Seal.


Lot 1 in Sec 19
E ½ half of N.E quarter of Sec 19 T 1 N R 5 W
22.46 a.
227 a.
257 a.
45.10 Acres.
316 a.
RANCHO SAUCELITO
RANCHO CORTE MADERA DEL PRESIDIO
LAND OF B. C. ALLEN

In January, 1875, the various parties holding an interest in the land in said rancho outside of the Matthewson survey joined in a deed to Throckmorton conveying a specific tract, but whether that deed included the land in contest or not is immaterial, since it does not appear that any one of the grantors named therein had any interest in any land not included in the Rancho "El Corte de Madera del Presidio" in July, 1866, or had acquired it from any party who had purchased the land in good faith from the Mexican Grantee or his assigns prior to that date.

Throckmorton's claim must therefore be rejected for the reason that neither he nor his grantors prior to July 23, 1866, had purchased the tract applied for from the Mexican Grantee of the Rancho "El Corte de Madera del Presidio" or from his assigns.

Wormouth in 1859 purchased the improvements of a
131 prior occupant on a tract that included the land applied for with other land since included in the lines of Corte de Madera Grant.

His first house was included within one survey of that grant. He then built another and that was also included in another survey of the same grant. In 1880 he built a third house on that part of his claim that is outside of the grant and on the land in contest. His residence, improvement and cultivation so far have been sufficient to show his good faith and he should be allowed to enter the land on advertising according to law and making final proof.

CHAS. H. CHAMBERLAIN,
Receiver.
WM. R. WHEATON,
Register.

Law Office J. A. Robinson,
509 Montgomery Street, Rooms 3 and 4.
Mining Patents a Specialty.

San Francisco, Cal., August 19, 1885.

To the Register and Receiver of the United States Land Office,
San Francisco, Cal.

Gentlemen: Appeal is hereby taken from the whole of your decision rendered August 11th, 1885, in the case of S. R. Throckmorton vs. Edward Wormouth, to the Honorable Com-

missioner of the General Land Office, Washington, D. C.

Respectfully,

J. A. ROBINSON,
Attorney for S. R. Throckmorton.

ASSIGNMENT OF ERRORS.

1st. The decison is contrary to law.

2nd. The decison is contrary to the evidence.

3rd. The Register and Receiver erred in holding and deciding that S. R. Throckmorton was not a purchaser in good faith under the 7th section of the act of Congress approved July 23rd, 1866.

4th. In holding and deciding that a purchaser under
132 said act must be made prior to date thereof. The Supreme Court of California in the case of Bascom vs. Davis, No. 5824, decided that the Act of July 23rd, 1866, was not only retroactive but intended also to be prospective, and further decided that all statutes should be so construed.

In holding and deciding that S. R. Throckmorton is not entitled to purchase the land applied for by reason of having purchased an undivided interest in the Rancho Corte del Presidio, he having perfected his title by purchase, occupation and possession long prior to the date of issuance of the patent, he is entitled to purchase the land under the Act of July 23rd, 1866. The date of the patent being the time governing in such cases and not the date of the Act of Congress.

6th. In deciding in favor of Wormouth and awarding him the land sought to be purchased by S. R. Throckmorton.

J. A. ROBINSON,
Attorney for S. R. Throckmorton.

State of California,
City and County of San Francisco—ss.

Jacob Gardner, being duly sworn, deposes and says that he is the Grantee in that certain deed dated July 17th, 1890, executed by Susanna M. Throckmorton, which said deed conveys to affiant all the right, title and interest that the said Susanna M. Throckmorton then had or may thereafter acquire of, in and to those certain lots, pieces or parcels of land situate, lying and being in the County of Marin, State of California, and more particularly described as follows, to wit:

Lot three (3) of section twenty-eight (28) and lot three (3) of section twenty-nine (29), township one (1) north, range six (6) west, Mount Diablo base and meridian, containing forty-three (43) acres of land, more or less, being a part of the property conveyed by and described in that certain deed of conveyance made by Julius C. McCeney to Samuel R. Throckmorton, dated the 19th day of February, 1875, and recorded in the office of the County Recorder of said Marin County the
133 24th day February, 1876, in Liber "Q" of Deeds at pages 206, 207 and 208. And affiant further says that ever since the execution of the said deed to him by the said Susanna M. Throckmorton he has been and still is the owner of the right, title and interest of the said Susanna M. Throckmorton of, in and to the property conveyed by and described in her said deed.

JACOB GARDNER.

Subscribed and sworn to before me, this 5th day of September, 1890.

[Seal.] H. A. COBB,
Notary Public.

State of California,
City and County of San Francisco—ss.

I, Wm. A. Davies, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk of the Superior Court thereof (which Court is a Court of Record, having a seal), do hereby certify that H. A. Cobb, whose name is subscribed to the annexed instrument and thereon written and before whom the annexed oath or affidavit was taken, was, at the time of taking such oath or affidavit, a Notary Public in and for the City and County of San Francisco, residing in said City and County, duly authorized to take the same, and an officer duly authorized by the laws of said State to take and certify the acknowledgment and proof of deeds to be recorded in said State. And further that I am well acquainted with the handwriting of such officer and verily believe that the signature to such jurat or certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the Seal of the said Superior Court, at my office in said City and County, this 6th day of September, A. D. 1890.

[Seal.] WM. A. DAVIES,
Clerk.

State of California,
City and County of San Francisco—ss.

Jacob Gardner being duly sworn deposes and says that he

is the grantee and owner of the interest of Susanna M.
134 Throckmorton in the property herein after described; that Samuel R. Throckmorton died at the City and County of San Francisco, State of California, on or about the 28th day of May, 1883; that said Samuel R. Throckmorton left a will, dated September 21st, 1880, in and by which the said Susanna M. Throckmorton was named as his sole devisee and legatee; that said Samuel R. Throckmorton at the time of his death was a widower, and that said Susanna M. Throckmorton then was and is his only surviving child and his sole heir at law, that said will was admitted to Probate as the last will and testament of said Samuel R. Throckmorton, deceased, in and by the Superior Court of the said City and County of San Francisco, State of California, on the 27th day of July, 1883, that on the 23rd day of September, 1889, a decree of distribution was made and filed in and by said Superior Court of the said City and County of San Francisco, in the matter of the estate of said Samuel R. Throckmorton, deceased, which decree of distribution distributed to the said Susanna M. Throckmorton in her own right the property hereinbefore referred to and hereinafter more particularly described, to wit: All those certain lots, pieces or parcels of land situate, lying and being in the County of Marin, State of California, to wit: Lot three (3) of section twenty-eight (28) and lot three (3) of section twenty-nine (29), township one (1) north, range six (6) west, Mount Diablo Base and Meridian, and that said affiant is still the owner under Deed of Conveyance from said Susanna M. Throckmorton, of the right, title and interest of the said Susanna M. Throckmorton in and to said property to which she became entitled as the sole heir at law and devisee of the said Samuel R. Throckmorton, deceased, and acquired by her in and by the Decree of Distribution aforesaid.

JACOB GARDNER.

Subscribed and sworn to before me this 31st day of October, 1890.

[Seal.] H. A. COBB,
Notary Public.

State of California,
City and County of San Francisco—ss.

I, Wm. A. Davies, County Clerk of the City and County of San Francisco, State of California, and ex-officio Clerk
135 of the Superior Court thereof (which Court is a Court of Record, having a seal), do hereby certify that H. A. Cobb, whose name is subscribed to the annexed instrument

and thereon written and before whom the annexed oath or affidavit was taken, was, at the time of taking of such oath or affidavit, a Notary Public in and for the City and County of San Francisco, residing in said City and County, duly authorized to take the same, and an officer duly authorized by the laws of said State to take and certify the acknowledgment and proof of deeds to be recorded in said State. And further, that I am well acquainted with the handwriting of such officer and verily believe that the signature to such jurat or certificate is genuine.

In Witness Whereof, I have hereunto set hand and affixed the Seal of the said Superior Court, at my office in said City and County, this 31st day of October, A. D. 1890.

[Seal.] WM. A. DAVIES,
Clerk.

Annexed to said affidavit of said Jacob Gardner is a certified copy of a deed from Susanna M. Throckmorton of the City and County of San Francisco, State of California, party of the first part, to Jacob Gardner of the County of Marin, State of California, the party of the second part, dated the 17th day of July, 1890, whereby the party of the first part, in consideration of the sum of $10.00 granted, bargained, sold and conveyed to the party of the second part all the right, title and interest that the party of the first part now has or may hereafter acquire of, in and to those certain lots, pieces or parcels of land situate, lying and being in the County of Marin, State of California, and more particularly described as follows, to-wit:

Lot three (3) of section twenty-eight (28) and lot three (3) of section twenty-nine (29), township one (1) north, range six (6) west, Mount Diablo base and meridian, containing forty-three (43) acres of land, more or less, being a part of the property conveyed by and described in that certain deed of conveyance made by Julius C. McCeney to Samuel R. Throck-
136 morton, dated the 19th day of January, 1875, and recorded in the office of the County Recorder of Marin County the 24th day of February, 1876, in Liber "Q" of Deeds at pages 206, 207 and 208.

Duly acknowledged by the party of the first part on the 18th day of July, 1890, before Thomas E. Haven, Notary Public in and for the City and County of San Francisco. Filed for record September 2nd, 1890, in the County Recorder's office of said Marin County, but has not yet been transcribed into the proper record book.

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DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

Washington, D. C., September 22nd, 1896.

I, S. W. Lamoreaux, Commissioner of the General Land Office, do hereby ertify that the annexed copy of the testimony, orders ad proceedings in the case of S. R. Throckmorton vs. E. Wormouth, arising under the seventh section of the Act of Congress approved July 23rd, 1866 (14 U. S. Stat., p. 213). and the maps and exhibits in the said case which involved lands in township one north of range six west of the Mount Diablo meridan in California, is a full, true and literal exemplification and copy of all the said testimony, orders, proceedings maps and exhibits on file and of record in this office, from the commencement of said case to the decision of Lewis A. Groff, Commissioner of the General Land Office, in said case, which was rendered on said testimony on June 18, 1890.

In Testimony Whereof, I have hereunto subscribed my name and caused the Seal of this Office to be affixed at the City of Washington on the day and year above written.

[Seal.] S. W. LAMOREAUX,
Commissioner of General Land Office.

REED PATENT.

Defendants here offered and read in evidence the patent of the United States to the heirs of Juan Reed, dated February 25th, 1885.

137 The patent recites that under act of Congress of March 3rd, 1851, to settle land claims in California, Hilaria Sanches de Reed, widow, and Juan Reed, Hilaria Reed, Ynez Reed and Ricardo Reed, children of Juan Reed, deceased, filed petition on 3rd December, 1852, and on 13th of June, 1854 (same parties omitting Ricardo), filed an amended petition with the Commissioners to ascertain and settle private land claims in the State of California, at San Francisco, claiming confirmation of Rancho "Corte de Madera del Presidio," founded on Mexican Grant to Juan Reed, made on 2nd October, 1834.

Also recites that the said Board of Land Commissioners on the 13th day of June, 1854, in the case "Heirs of Juan Reed vs. The United States," rendered its decree as follows—(here follows a copy of decree of Board of U. S. Land Commissioners hereinbefore set forth in this Bill of Exceptions in the record of evidence before the U. S. Register and Receiver in the contest between Throckmorton and Wormouth).

Also recites that an appeal from said decree was taken to the District Court of the United States for the Northern District of California, and said decision of the Board of U. S. Land Commissioners was modified and affirmed by said District Court on 14 January, 1856.

(Here follows copy of Decree of Confirmation by U. S. District Court as hereinbefore set forth.)

Also recites that notice was given by U. S. Attorney General that no appeal would be taken and that on April 2d, 1857, said District Court ordered that claimants have leave to proceed as under a final decree.

Also recites that the U. S. Surveyor General for California made his return, plat and survey dated March 24th, 1883, reciting that said Surveyor General made a true and correct survey of said tract of land in conformity with the grant thereof and the said decision of said Court. The descriptive notes of said survey, so far as material to this case, are as follows:

DESCRIPTION.

"Beginning at a post marked C. M. P. 181 on the line between sections 28 and 29, T. 1 N., R. 6 W., Mt. Diablo
138 meridian, distant 20 chains north of corner to sections 28 and 29, 32 and 33, from which post the center of a madrone tree four feet in diameter marked B. T. C. M. P. 181, bears S. 24 degrees, E. 87 links distant, this post stands on the place formerly known as the Solar, which 'faces west,' and on the edge of the forest of redwoods called Corte Madera del Presidio, thence according to the true meridian, the variations of the magnetic needle being 16 degrees 30 minutes east, on line between sections 28 and 29, S. 2 chains 45 links to the center of the Arroyo Corte Madera del Presidio, being the northerly boundary of the Rancho 'Sausalito' Station; thence down the center of said arroyo through a dense thicket of willows formerly known as the 'Sausal' S. 33 degrees 45 minutes E. 5 chains 85 links to station.

(Then follows numerous courses and distances, the last two being as follows):

* * * Thence S. 26 degrees 45 minutes W. 15.10 chains to a laurel 24 inches in diameter marked P. Q. 99 station; thence leaves said arroyo and the boundary of the Rancho Punta de Quentin and ascends S. 9 degrees W. at 47 chains top of a high ridge course east and west; a high peak of the ridge bears W. 7 chains 45 links distant and descends at 82 chains, crosses gulch course 81 degrees E. and ascends at 100

chains 50 links top of a ridge, course southeasterly and northwesterly and descends 149 chains 80 links to the post marked C. M. P. 181, the point of beginning, containing 7845.12-100 acres.

"And attached to said survey is a plat of the said rancho as surveyed by the said Surveyor General, and which survey and map do not include the land in controversy within the boundaries of said rancho, and the said patent thereupon gives and grants to the said heirs of Juan Reed, to-wit: John Reed, Hilaria Reed and Inez Reed, their heirs and assigns, a tract, the land embraced and described in said survey.

The following is a copy of so much of said map contained in said patent as bears upon the matters in controversy herein:

[Map.]

139 See Original Transcript.

George M. Dodge was here sworn as a witness on behalf of defendants and testified as follows:

I am a civil engineer and have practiced that profession for many years past and I am familiar with the lines of the Corte Madera del Presidio Ranch and the Rancho Sausalito. I have made a map which shows the Arroyo Holon and the Arroyo Corte Madera del Presidio. It is made from official United States Government surveys. The lines of the Rancho Sausalito and the Rancho Punta de Quentin are shown on the map and also a portion of the Corte Madera del Presidio Rancho.

The 80-acre tract described in the deed from T. B. Deffebach and others to Julius C. McCeney and shown on the map by dotted lines. The map was here offered and admitted in evidence and is marked Defendant's Exhibit "17" and the following is a copy thereof:

[Map.]

Cross-Examination of George M. Dodge.

I have seen the map which is here presented to me and marked Plaintiff's Exhibit "I." It looks very much like a copy of a map I made, but I did not make that map. It is a correct diagram. The dotted lines show Mr. Wormouth's old fence. The boundary line of the Rancho Corte Madera del Presidio is shown there. The Mathewson survey is shown by the red lines. The map was admitted in evidence on behalf of plaintiff and the following is a copy thereof:

[Map.]

See Original Transcript.

Rancho Punta de Quentin
Corte Madera Slough
Small Islands
Arroyo Holon
Post PQ 97
Salt Marsh
Slough
Land
Public
T. 1 N. R. 6 W.
Lot No. 40
Point of Beginning at place formerly known as the Solar
Salt Marsh
Head of Marsh
Sausalito Rancho

16920

120 B

16921

120 C

The Mathewson survey ran due east from "C. M. P. 181" and thence south to the arroyo and then along the arroyo. The most westerly line of the Matthewson survey coincides with the present patented line from "C. M. P. 181" south to the creek. It starts due east, then it runs north, then east and then north. That line is all east of the present patented line. The land in controversy starts at "C. M. P. 181" and runs east. The Mathewson survey went clear around the ranch and was a survey of the Reed Ranch and is all included within
140 the ranch as at present patented. The western boundary of the ranch so far as it was made by Mathewson is contained in the course running from the creek due north to 181. That is a portion of the western boundary of the ranch as patented.

DECISION COMMISSIONER GENERAL LAND OFFICE.

Refer in reply to this initial "D."

Dept. of the Interior, Gen'l Land Office.

W. O. C.
J. R. C.
J. B. L.

Washington, D. C., June 18, 1890.

Register and Receiver,
U. S. Land Office,
San Francisco, Cal.

Sirs:

I have examined the contested case of S. R. Throckmorton vs. Ebenezer Wormouth, forwarded with your letter of February 9, 1886, involving the right of Mr. Throckmorton to purchase under the 7th section of the Act of July 23, 1866 (14 Stats. p. 218), lot 3, section 28, and lots 2 and 3 and S. E. ¼ of N. E. ¼ section 29, Tp. 1 N., R. 6 W., M. D. M., California.

The record shows that on December 18, 1871, Ebenezer Wormouth filed D. S. 18,661, alleging settlement March 1st, 1859, for lot 3, section 28, and lot 3, section 29, same township and range. On September 4, 1880, Wormouth filed D. S. 15,517, alleging settlement March 5, 1859, claiming the same land. On May 20, 1881, the said Wormouth made H. E. 4415 upon the same land.

The seventh section of the act of July 23, 1866, provides:

"That where persons in good faith and for a valuable con-
"sideration have purchased lands of Mexican grantees or as-
"signs, which grants have subsequently been rejected, or
"where the lands so purchased have been excluded from

"the final survey of any Mexican grant, and have
141 "used, improved and continued in the actual pos-
"session of the same, as according to the lines of "their original purchase, and where no valid adverse right or "title (except of the United States) exists, such purchasers "may purchase the same, after having such lands surveyed "under existing laws, at the minimum price established by "law, upon first making proof of the facts, as required in this "section under regulations to be provided by the Commis-"sioner of the General Land Office."

The Rancho Corte de Madera del Presidio was granted by Gov. Figueroa to Juan Read. It was confirmed by the Board of Land Commissioners, June 12, 1854, and is described as follows:

"Commencing from the solar which faces west at a point "at the slope and foot of the hills which lie in that direction "and on the edge of the forest of redwoods called Corte de "Madera del Presidio, and running from thence in a north-"wardly direction four thousand five hundred varas to an "arroyo called Holon, where is another forest of redwoods "called Corte de Madera de San Pablo; thence by the waters "of said arroyo and the Bay of San Francisco," etc., etc., "be-"ing the same land described in the testimonial of juridical "possession on file in this case, as having been measured to "said Juan Read under a grant of the same to him, to which "testimonial and the map therein referred to, and constituting "a part of the *expediente*, a traced copy of which is filed in the "case, reference is to be had."

By reference to the *expediente*, it is found that the Magistrate, in giving juridical possession, commenced at the "Solar, "which faces west, and standing at the slope and foot of the "hills which lie in that direction, and on the edge of the tract "of redwoods called Corte de Madera del Presidio they com-"menced said measurement, and going from S. to N. they "measured to an arroyo called Holon, where is another forest "of redwoods called Corte de Madera de San Pablo, ninety "cordels of fifty varas," thence from this point N. to S. to Point Tiburon, etc.

142 The point of beginning or solar referred to by the Board and in the expediente has been fully identified in the surveys of the rancho by this office and has been marked by a post, C. M. P. 181, and is on the western boundary or limit of this claim. This claim was surveyed in the year 1858 by U. S. Deputy Surveyor Matthewson, and he, in making the

survey, determined the western boundary to be at the solar.

This survey was for quantity (one league) within larger boundaries. Upon examination by this office, this survey was, by decision of May 6, 1871, approved. The Department, on January 6, 1872, reversed this decision and held that the grant was one by boundaries, and not for quantity, that in segregating the same from the public domain it should be surveyed according to the boundaries described in the decree of conformation and grant.

A re-survey was accordingly ordered, and in the months of November and December, 1873, and June, 1874, U. S. Deputy Surveyors Ransom and Allardt executed a survey of this claim, which survey was accepted by this office as properly describing the land as granted. The Ransom and Allardt survey was approved by the department in letters dated July 28, 1882, and January 31, 1883, to this office, and was finally approved as contemplated by the act of July 1, 1864 (13 Stat. 332). Patent issued February 25, 1885.

The solar, or house lot, has been fully identified and recognized as at a point 20.00 chains due north from the corner to sections 28, 29, 32 and 33, Tp. 1 N., R. 6 W., M. D. M.

From this point the survey by Matthewson runs east and south and the survey by Ransom and Allardt runs N. 9 degrees E. to the Arroyo Holon and thence down this arroyo to the bay, etc., and from this solar it runs south to the Arroyo Corte Madera del Presidio and following down this arroyo to the bay, etc. No official survey has ever been made showing the line to be west of that established by Ransom and Allardt. In the record is found a tracing of a private survey made by C. C. Tracy, showing that a line drawn from a point on Corte de Madera Arroyo, called "Old Mills," which throws
143 this western boundary further west, but this survey was never recognized by this Government.

In the suit of Bolton vs. Van Reynegan et al., the land involved is mostly outside of the Matthewson survey, but entirely within the claim as finally surveyed and patented. This case can therefore have no bearing whatever on the application under consideration, as the land involved in Throckmorton's application is entirely outside of the claim as finally approved and patented. And again the claimant refers to the suit of Throckmorton vs. Wormouth in the District Court of the 22nd Judicial District in and for Marin County, California.

In the Bill of Complaint, the land described lies wholly within the patented limits of the Rancho Corte de Madera del

Presidio. Both these cases show that the lands claimed by Throckmorton are within the grant as surveyed and patented.

The survey of Ransom and Allardt has been approved and patented, and shows the exterior boundaries of this claim as granted, the grant claimants have by patent obtained all the land to which they were entitled under the grant.

By reference to the plats of the survey of public lands in Tp. 1 N., R. 6 W., M. D. M., it will be seen that the land claimed lies west of the patented line of the Rancho Corte de Madera del Presidio.

Everything in the case, with the exception of the tracing made by C. C. Tracy, which was a private survey, shows that the land claimed to have been purchased by Throckmorton lies outside of the grant. The land now claimed under the Act of 1866 was never included in a Spanish or Mexican grant, hence was never rejected or excluded as contemplated by said Act of 1866, and is not subject to purchase by him under said Act. By reference to the record in the case, I find that on August 12, 1865, John J. Read and others, heirs of Juan Read, the confirmee, conveyed to James C. Bolton all the undivided ½ of the Rancho Corte de Madera del Presidio not included within the survey of Matthewson of 1858 for 4,460.24 acres. On the same day the parties entered into an agreement with Bolton, which agreement is in the following terms, viz. "Whereas, John J. Reed, Hilaria M. Reed, Thomas
"B. Deffebach and Inez Deffebach, his wife,
144 "have this day executed and delivered to me a
"deed of the undivided *one-half* part of all the rancho
"'Corte de Madera del Presidio,' situate in the County of
"Marin, in the State of California, *which is not included* in the
"survey of the said rancho which was made under instructions
"from the U. S. Surveyor General for the State of California
"by R. C. Matthewson, Deputy Surveyor, in October, 1858, and
"approved by J. W. Mandeville, United States Surveyor Gen-
"eral for California, September 19th, 1859, said approved sur-
"vey containing four thousand four hundred and sixty 24-
"100ths (4,460 24-100ths) acres of land, the said rancho being
"the same which was granted to Juan Reid by the Mexican
"Government. Now, therefore, in consideration of the execu-
"tion and delivery of said deed, I hereby agree with them to
"give my professional services before the Courts of the United
"States and the proper authorities at Washington, and to use
"my best endeavors to procure a patent from the United
"States Government for all the land included in the grant
"from the Mexican Government of the said rancho, without

"any expense or charge whatever to them, excepting the ex-
"pense of a new survey of said land (which they, themselves,
"are to pay), and in case I shall fail to obtain a patent for
"more than is included in the above-mentioned approved sur-
"vey, then I shall procure for them, free of all charges, a pat-
"ent for the land included in the said approved survey," &c.

* * * * * * * *

On October 16, 1865, J. C. Bolton conveyed to R. Steinbach all the undivided $\frac{1}{4}$ part of said rancho.

On March 8, 1866, R. Steinbach conveyed to Emil Steinbach all the undivided $\frac{1}{4}$ part acquired from Bolton.

On June 16, 1866, Emil Steinbach conveyed to Emil Gibson the interest acquired from R. Steinbach.

On June 19, 1866, Emil Gibson conveyed to Samuel R. Throckmorton the interest acquired from E. Steinbach.

On July 25, 1868, J. C. Bolton conveyed to Thos. B. Valentine all the undivided part of said rancho.

On May 11, 1869, John J. Reed conveyed to Hugh A. Boyle all his interest in the Corte de Madera del Presidio
145 rancho, outside of the Matthewson survey.

On May 24, 1869, Hilaria Reed conveyed to Hugh A. Boyle all her interest in said claim outside of Matthewson survey.

On February 1, 1871, Thos. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle, T. B. Valentine, H. C. Newhall and Maria G. de Boyle conveyed to Julius C. McCheney a certain tract of land by metes and bounds; this included the land now applied for. On January 19, 1875, J. C. McCeney conveyed the last described tract to Samuel R. Throckmorton.

It will be seen by the foregoing that the interest acquired through Bolton was for an undivided portion of so much of the rancho Corte de Madera del Presidio as could be obtained in excess of the quantity surveyed by Matthewson in 1858.

The survey made by Matthewson contains 4,460.24 acres; the interest of Bolton was for an undivided one-half of so much land as could be obtained in excess of this survey.

The survey of Ransom and Allardt, the finally approved and patented survey, contains 7,854.12 acres, or 3,384.88 acres in excess of the Matthewson survey. The conveyance being for an undivided interest in all the land acquired in addition to the Matthewson survey, the deed could only be effective to the land included in the Ransom and Allardt survey outside of the Matthewson survey, or the undivided one-half interest in 3,384.88 acres.

The Act of 1866 provides "that when persons in good faith "and for a valuable consideration have purchased lands of "Mexican grantees * * * may purchase the same after "having such lands surveyed under existing laws at the mini-"mum price," etc.

There is nothing in the record to show that any of Throckmorton's grantors had any interest in any land not included in the Rancho Corte de Madera del Presidio prior to July 23, 1866, or that they had acquired it from any party who had purchased the land in good faith and for a valuable consideration from the Mexican grantee or his assigns prior to that date. For the reasons stated, the application to purchase under the Act of 1866 must be denied.

146 If Mr. Wormouth is qualified to make a homestead entry, and the land is subject to entry, his application should be allowed.

You will give notice of this decision to the parties in interest, allowing the usual time for appeal under the rules of practice. Respectfully,

LEWIS A. GROFF,
Commissioner.

Service of the within decision admitted June 27th, 1890.

J. A. ROBINSON,
Attorney Heirs of S. R. Throckmorton, Deceased.

Filed June 24, 1890.

DECISION SECRETARY OF THE INTERIOR.

Defendants' attorney here offered and read in evidence the decision of the Secretary of the Interior, dated October 24th, 1891, of which the following is a copy:

Department of the Interior,
Washington,
October 24, 1891.

S. R. Throckmorton
v. Mexican Grant.
Ebenezer Wormouth.
Commissioner of the
General Land Office.

Sir:

I have examined the record in the case of S. R. Throckmorton against Ebenezer Wormouth, involving the right to lot 3, section 28, and lots 2 and 3, and the S. E. ¼ of the N. E. ¼ section 29, T. 1 N., R. 6 W., San Francisco, California.

The land is claimed by Wormouth under his homestead entry, made May 20, 1881.

Throckmorton's claim is based on a purchase from the heirs and assigns of Juan Read, the grantee under a Mexican grant, known as the Rancho *Corte de Madera del Presidio*, which was confirmed by the Board of United States Land Commis-
147 sioners June 13, 1854.

The description in said confirmation was by metes and bounds, as follows:

"The land of which confirmation is hereby made is the same "on which said Juan Read resided in his lifetime; is known "by the name of Corte de Madera del Presidio; is situated in "Marin County and bounded as follows, to-wit: Commencing "at the Solar which faces west, at a point at the slope and "foot of the hills which lie in that direction and on the edge "of the forest of redwoods, called Corte de Madera del Pre-"sidio, and running from thence in a northwardly direction "four thousand five hundred varas to an arroyo called Holon, "where is another forest of redwoods called Corte de Madera "de San Pablo; thence by the waters of said arroyo and the "Bay of San Francisco ten thousand varas to the Point Tabu-"ron, said point serving as a mark and limit; thence running "along the borders of said bay and continuing in a west-"wardly direction along the shore of the bay formed by Point "Caballos and Point Taburon four thousand seven hundred "varas to the north of the Canada and the point of the "'Sausal,' which is near the Estero lying east of the house on "said premises, which was occupied by said Juan Read in No-"vember, 1835, and thence continuing the measurement from "east to west along the last line eight hundred varas to the "place of beginning; containing one square league of land, "be the same more or less; being the same land described in "the testimonial of juridical possession on file in this case, as "having been measured to said Juan Read under a grant of "the same to him."

This claim was surveyed in 1858 by United States Deputy Surveyor R. C. Mathewson. This survey was of quantity and made to approximate one square league and contained 4,460.24 acres.

August 12, 1865, the heirs of Juan Read (original grantee from the Mexican Government) conveyed to one James C. Bolton, a lawyer of New York City, "All the undivided one-
"half part of all the Rancho Corte de Madera del Pre-
148 "sidio . . . which is not in the survey of said

"rancho which was made under instructions from the "U. S. Surveyor-General for the State of California by R. C. "Mathewson." Subsequent to the sale of this undetermined and undivided interest . . . to wit: In November and December, 1873, and June, 1874, . . . a re-survey was made by direction of this Department, which was accepted by your office, and patent issued for the land therein described, February 25, 1885.

The last survey, upon which patent issued, described the grant by metes and bounds, and was intended to conform to the description contained in the original grant by the Mexican Government. This survey contained 7,854.12 acres, or 5,393.88 acres in excess of the Mathewson survey.

It was a one-half interest in this excess that was conveyed to Bolton, and the consideration therefor was his "professional services" in procuring a new survey and patent for all the land thus shown to be embraced in the grant.

June 19, 1866, Throckmorton, through several transfers from Bolton, procured title to an undivided half of Bolton's interest, or an undivided one-fourth interest in that part of the rancho not included in the Mathewson survey.

January 19, 1875, the heirs of Read and their transferees conveyed to Throckmorton, by metes and bounds, the land in controversy, containing between seventy-three and seventy-four acres. This land is not included in the grant to Read as last surveyed, nor can I find from the record that it was included in the Mathewson survey. Throckmorton claims the right to purchase it under the 7th section of the act of July 23, 1866 (14 Stat., 218).

That section provides:

"That where persons in good faith and for a valuable con-
"sideration have purchased lands of Mexican grantees or as-
"signs, which grants have subsequently been rejected, or
"where the lands so purchased have been excluded from the
"final survey of any Mexican grant; and have used, imposed
"and continued in actual possession of the same as ac-
149 "cording to the lines of their original purchase, and
"where no valid adverse right or title (except of the
"United States) exists, such purchasers may purchase the
"same."

It cannot, I think, be seriously contended that the interest acquired by Bolton to the undivided "half-part" of the land in excess of the Mathewson survey that should be acquired by a new survey, is such an interest as would entitle him or

his transferree, Throckmorton, to purchase under said act. His rights, if he has any, must depend upon his purchase of January 19, 1875, in which he purchased by metes and bounds, from the heirs and assigns of Juan Read, the land in controversy, which joins the Rancho Corte Madera del Presidio on the west.

At the date of this purchase the new survey had already been made, and was awaiting approval by this Department, which fact must have been known to Throckmorton, for he had long before acquired title, through Bolton, to an undivided one-fourth interest in the excess that should be procured by the new survey. That survey did not embrace the land in controversy, but formed a part of the eastern boundary thereof; in other words, the land claimed by Wormouth and Throckmorton is immediately west of the western boundary of the rancho, as established by the last survey, which said western boundary, according to the best evidence I can get from the record, is the same as that established by Mathewson. In order that he may be entitled to purchase under said section 7, it must appear that he was a purchaser *in good faith* . . . that is, as I construe it, he must have believed that the lands so by him purchased were within the limits of the grant, as originally defined, where, as in this case, the granted land is described by metes and bounds. If, on a proper survey by the government, the land so purchased should be found to be outside the limits of the grant, he would be entitled to purchase under said section, because he had originally purchased and paid for the land in the honest belief that his grantors had the right to convey.

150 I find nothing in the evidence to convince me that this land was ever occupied, cultivated or improved by Reed, his heirs or assigns, prior to the purchase by Throckmorton. The only evidence of any occupation prior to 1872, other than Wormouth's, is the testimony of Throckmorton himself and his rentor, that as far back as 1857 there was a fence along the southwestern boundary of the land in dispute. Who built the fence, or for what purpose, is not shown in the evidence. It may have been to mark the northern boundary of the Rancho Saucelito, which joins this on the south, or it may have been placed there by some one designing to claim the land from the government, or for many other purposes. The evidence is entirely insufficient to show that Read or his heirs or assigns placed it there either to improve or mark the boundary of their claim.

It is true that in 1872, prior to his purchase, Throckmorton enclosed the land with a fence, and has been grazing the same ever since, except about fourteen acres included in Wormouth's house lot. He claims that this was done in pursuance of an amicable partition, setting apart his interest, the deed to which was made by the several grantees to one McCeney, and by him conveyed to Throckmorton, January 19, 1875.

It is shown in evidence that at the time Throckmorton commenced to enclose this land (1872) he was notified by Wormouth (who was there residing on the land) of his claim thereto.

The evidence on the part of Wormouth shows that he has made his home on the land ever since 1859, and that at that time and ever since the land was understood in the neighborhood to be government land and was never supposed to be included in the grant to Read.

The evidence shows beyond the shadow of a doubt that at the several dates at which Throckmorton's interests attached, the boundaries to this grant were in dispute, and that he purchased with full knowledge of the unsettled condition of the boundaries. His first purchase of an undivided half of Bolton's interest was made on speculation, and de-
151 pended for its value on a change in the boundaries as established by the Mathewson survey. His purchase in 1875 of the land in controversy was made before these boundaries had been finally established and with full knowledge of that fact, as well as the claim of Wormouth.

Section 7 of the act referred to was not, in my judgment, intended for the protection of such a purchaser, but applies only to a purchaser who buys relying on the boundaries as generally accepted and supposed to be the correct ones, and which afterward, by the final survey, are found to be incorrect, whereby his land is shown to be outside the grant, and affords no protection to one who buys knowing that the boundaries are in dispute, and that a new survey has already been ordered to determine the true boundaries. Such a purchaser must abide the result of the survey and cannot and should not be allowed to claim the right to purchase land under said act that has for more than twenty years been occupied, claimed and improved by a settler and claimed under the government land laws. But, aside from the speculative character of this purchase, an examination of the record history of this grant satisfies me that Throckmorton is without a

plausible pretext to be considered an innocent and unsuspecting purchaser.

The grant, as shown by the *expediente*, was described by metes and bounds, and was in no sense of the word a float to be located somewhere within defined exterior boundaries.

In the petition of Juan Reed to the General of the Territory of Upper California, the land is described as "*El Corte de Ma-*"*dera del Presidio* to the *Punta del Tiburon*, as shown by the "sketch or plan which your Excellency has in your posses-"sion." In the grant itself it is described as, "Known by the "name of Corte de Madera del Presidio as far as La Punta del "Tiburon, bounded by the Mission of San Rafael and the Port "of San Francisco, the proper measures and examinations be-"ing *previously* made as required by laws and regulations."

In the measurement made by the Alcalde, when
152 juridical possession was given to the grantee, the grant is described as starting from a "forest called Corte de "Madera del Presidio, a little brook with a willow thicket, "and the remains of a rancheria called 'Anamus,' thence con-"tinuing the examination and view of said lands they (the "witnesses) led me *north* to another arroyo and forest of red-"wood trees, called also Corte de Madera de San Pablo, and "they said it was the boundary with the pueblo of San Ra-"fael, and thence continuing the examination as far south as "Point Tiburon, which they said was the limit in that direc-"tion, we continued to the west to the Point Estero, which "empties in the bight formed by the said Point Tiburon and "Point Caballos on the south, and which ends at the entrance "of said Canada, where is situated the house of the owner of "said lands, Don Juan Read, the arroyo, willow thicket and "forest of redwood trees, named Corte de Madera del Presidio, "aforesaid, which they said was the last boundary of the said "lands pertaining to the rancho referred to of Corte de Madera "of Senor Read."

The description in the confirmation heretofore given starts from the same point, the "forest of redwoods called Corte de "Madera del Presidio, running thence in a *northwardly* direc-"tion four thousand five hundred varas to an arroyo," etc. Thus, it will be seen that in the expediente, the grant itself, the measurement in the juridical possession and in the decree of confirmation by the United States Commissioners, the land is definitely described as fixed and determined.

In all the measurements and surveys, including the

Mathewson and the last approved survey, the starting point was identical and was on the western boundary of the grant, thence invariably either north (as in the juridical measurement), or northwardly (as in the confirmation description), to an arroyo (stream) called Holon, thus showing that the western boundary of the grant from the starting point to the Holon was a straight line, and so could not have followed the meanderings of the Arroyo Corte de Madera del Presidio, along which the ancient fence was situated, as claimed
153 by Throckmorton.

These measurements and surveys, except the last one, were of record when Throckmorton's rights attached, and I can not find that the western boundary was ever in dispute, certainly the land in question was never included in any measurement or survey from which it was excluded by a subsequent one, which was finally approved.

I find that the land in question has always been public land, and has never been regarded by disinterested people as being included in the grant to Read, and that Throckmorton, when he purchased the land in controversy, either knew or had good reason to believe that the land was not included in said grant, and that he was therefore not a *bona fide* purchaser within the meaning of the Act of July 23, 1866 (14 Stat., 218).

The decision of your office, denying his application to purchase under said act, is accordingly affirmed, and the papers are herewith returned.

Very respectfully,

GEO. CHANDLER,
Acting Secretary.

EBENEZER WORMOUTH.

Ebenezer Wormouth was then called and sworn as a witness on his own behalf and testified as follows:

I am the plaintiff in this case; I know the land in controversy; I hold United States patent for it; I settled there first, on the 5th of March, 1859; I went there to live and kept a house there; I was living there on the 20th of May, 1881, at the time I made this homestead entry.

Plaintiff's counsel then offered in evidence a certified copy of the entry in the United States Land Office, showing that E. Wormouth entered the land as a homestead entry on the 20th day of May, 1881; and also offered a certified copy of a certificate of purchase from the United States, dated July 22nd,

1892, showing that said Wormouth had paid the purchase money for the said land under the said entry.

154 The following is a copy of said certificate of purchase:

No. 18789. Land Office
at San Francisco, Cal.
July 22, 1892.

It is hereby certified that, in pursuance of law, Ebenezer Wormouth of Mill Valley, P. O., in Marin County, State of California, on this day purchased of the Register of this office the lot three (3) of Section twenty-eight (28) and lot three (3) of Section No. twenty-nine in township No. one North of Range No. six west of the M. D. Meridian, containing 46 and 26-100 acres, at the rate of one dollar and twenty-five cents per acre, amounting to fifty-seven dollars and eighty-three cents, for which the said Ebenezer Wormouth has made payment in full as required by law.

Now, therefore be it known that, on presentation of this certificate to the Commissioner of the General Land Office, the said Ebenezer Wormouth shall be entitled to receive a patent for the lot above described.

JOHN F. SHEEHAN,
Register.

Across the face of said certificate is written in red ink the words and figures "H. E. No. 4415 of May 20, 1881, commuted."

Indorsed, No. 18789, Cash Entry, Land Office at San Francisco, Cal., Sec. 28 and 29, Town. 1 N., Range 6 W., M. D. M.
EBENEZER WORMOUTH.

H. E. No. 4415.
Lot 3 of Sec. 28 and lot 3 of Sec. 29.
Filed May 20, 1881.
Patented Aug. 14, 1893. (Duly certified.)

Plaintiff's counsel then offered in evidence the Receiver's receipt to the said Wormouth, of which the following is a copy:

No. 18789. Receiver's Office
at San Francisco, California,
July 22nd, 1892.

155 Received from Ebenezer Wormouth of Marin County, California, the sum of fifty-seven dollars and eighty-three cents, being in full for the lot 3 of Sec. 28, and lot 3 of Sec. 29, in T. No. one North, Range 6 West, M. D. M., contain-

ing forty-six acres and twenty-six hundredths at $1.25 per acre.

T. B. SHANNON,

$57.83 Receiver.

Across the face of said paper is written in red ink the words and figures: "Commuted H. E. No. 4415 of May 20, 1881."

(Witness resuming.)

My patent is dated the 14th day of August, 1893. It was here admitted by counsel that the defendants were in the adverse possession of the land described in the complaint, except parcels "A" and "B" described in the answer, ever since the 1st day of February, 1891, without plaintiff's consent.

(Witness resumed.)

I am and have been in possession of part of this land since 1859. I bought out one Samuel Warren and what interest he had there, and everything he had in the way of improvements on that piece of land, and some chickens and hay; there was a house on it that he lived in; I bought that house; it was a shanty; I bought the whole thing; I got a quit claim for it, but I did not get it on record, and when my house was burned it was burnt up with it; the diagram marked plaintiff's exhibit "I" shows the lands described in the complaint; the land I had possession of from 1859 to 1891 is shown by the dotted lines on that map; I had afterwards some more enclosed above the road: down to 1891 those dotted lines show it; now the black line shaded yellow shows lot 3 in Sec. 29 and lot 3 in Sec. 28, 46 acres and some hundredths; the land I am suing for is the part of lot 3, Sec. 29, and lot 3, Section 28, outside of that fence, and shown by the dotted lines; the house I bought from Sam Warren was a little house west of what is now the ranch line of the Corte Madera del Presidio; I lived in that house at the time I settled there; it was east of the Mathewson survey, the first house there, and then afterwards that was burnt up and I built one just inside of the Mathewson survey; the
156 red line shows the Mathewson survey; that must have been the one that was inside of the Mathewson survey and it does not show the one that was burned up; the one that was burned up was a little inside of that; there is a little corner of that house that crossed the Mathewson survey about six or eight inches and all the rest of it is on the west side of what was then the Mathewson survey.

Q. How was it used or claimed at that time? Was it used or claimed by the Reed heirs or anybody claiming under them?

A. Not at that time, because there were lots of settlers on

it, and they claimed it and lived on it and raised cattle on it and cultivated it some. Sam Warren did not claim to be holding by virtue of any lease or title under the Reed heirs when I bought him out; all he paid was a certain amount for stumpage; that was about 1858, or maybe 1857; on the 1st of March, 1859, he went to New York; he said he had a right to the land as government land; I never cut wood to pay stumpage; when I was working I worked by the month for other people; I never paid rent to the Reeds, and Sam Warren succeeded George Cook and he never paid any rent because I lived with him and worked with him and knew all about it; the house I got from Sam Warren was burned down about 1861 or 1862; about 5 or 6 months after that I built that other house that is marked on the diagram right north of the Mathewson survey; I went to live in that and I had my fence all the time on those dotted lines; there was an old barn on the land; I afterwards put up the present barn that is there now; I bought the old barn and the whole thing; the old one blew down and I put up another on the same place 23 years ago; I built another house in 1880 on the west side of the patented line of the Reed Ranch; I have occupied that house ever since, and I have since built another house on the same land; I remember entering this land as a homestead in the United States Land Office by the entry that was read in evidence here; I was living on the land when I made the entry; I am a native born citizen of the United States and was living there with my wife and
157 have been living in that little house on the west side of the rancho 36 years, and have never been out of possession of that land and am still living there; the barn might be 200 or 150 feet from the westerly line of the Reed Ranch as patented. I went there for the purpose of making my home when I made my entry in the United States Land Office. I cultivated and dug up a portion of the land and cleaned off a lot of redwood stumps. It was as much as five or six acres and maybe more that I cleaned up before the time of my homestead entry. The improvements I put there, up to the time of the homestead entry, were of the value of about $500.00; they cost that. I cultivated the place for several years and then afterwards I pastured on it. I raised chickens and kept all the stock I could afford to keep. My fencing was sufficient to turn stock. I have been using that land in various was since 1859. I am not in possession of the land that is outside of my fence.

It was here admitted by counsel that plaintiff was kept out

of possession by Peter Gardner and Jacob Gardner, and that they are in possession of all the land, except the parcels "A" and "B" described in defendant's answer.

(Witness resuming.) Defendants are in there without my consent or permission. I have asked for the possession which parcels are shown by the dotted lines on plaintiff's exhibit "I."

Cross-Examination of E. Wormouth.

Sam Warren, from whom I bought this land, was there in 1858 and went away in 1859.

Q. As I understand you, he didn't pay any rent but paid stumpage?

A. He paid stumpage for wood he cut, but he cut on what is now the Sausalito Ranch.

Q. Didn't he cut on this property?

A. No. There was no wood on this property; it had been all cut off.

I never endeavored to take possession of the land which the defendants are in possession of; I was always waiting until this land was surveyed by the government so as to
158 know what was government land, so I could file on it, and as soon as it came to that I filed on it, and then Throckmorton commenced his contest, and I remember that he fenced up the land outside before any survey was made, and I informed him that I owned and claimed that land and intended to pre-empt; I could not get the possession from him; I did not want to fight for the possession; I thought I would get it in a legal way when the land came into the market; when he first built the fence I guess was in 1872 or 1873; that was the time I gave the notice, when he was fencing.

Re-Direct Examination of E. Wormouth.

Mr. Throckmorton up to 1872, when he built that fence, had never claimed or disputed my possession there; he never made any claim to this land to me until he got those deeds, pretending he bought them from those parties and went to fence up; he did not make any claim to the land so far as I know until he commenced making those fences; he never made any demand on me for anything or asserted any ownership of the piece of land described in my patent until he put that fence up; then he did not have any ownership of it; I was in possession; as soon as he began to inclose this land I gave him notice.

Q. Do you know of any acts of possession that he asserted there over the land that is now in your patent?

A. No more than having his tenants or some of them turn stock there on it; they lived on the other side of the creek on his ranch.

Q. Were they tenants specially of this particular piece of land?

A. No; they were not tenants living there at all. Those tenants lived on the Sausalito Ranch.

Re-Cross-Examination of E. Wormouth.

I was examined in this case when it was first tried. I suppose my testimony then was that I couldn't get possession of this land from Throckmorton, because he fenced right ahead of me and got outside of my measurement before the land came into market. That testimony was correct. I will
159 tell you that he fenced around outside of me before that land was surveyed by the Government and before I knew anything about where the section lines were he took possession before any Government plats were filed. Then Throckmorton put another fence. I forgot what time that was put there. It was on the west side of the Blythedale road. I don't remember the date of it, but it must have been 18 or 20 years ago. The township maps, offered by counsel for plaintiff, are considered in evidence for what they are worth, by consent.

The plaintiff here rested upon the equity branch of the case.

The said equity branch of the case was then argued and submitted to the Court for decision, thereafter on the 8th day of March, 1897, the Court made and filed its decision and findings thereon (see findings on equity issues ante page ——)

LEGAL ISSUES.

Stipulation.

The following stipulation was made onthe 4th day of January, 1897, by counsel for the respective parties and entered in the minutes of the Court, to-wit:

[Title of Court and Cause.]

By consent of the plaintiff and defendants by their respec-

tive attorneys in open Court, the demand of the defendants and each of them for a jury as to the issues made by the cross-complaint and answer thereto in the above entitled actions and in each of them is withdrawn, and on like consent of the parties, plaintiff and defendants herein respectively, in open Court. It is ORDERED that each and all of the issues made or raised by the pleadings of the respective parties to the above entitled actions and on file therein, shall be tried by the Court sitting without a jury, excepting only the issues as to the damages claimed by the plaintiff and as to the value
160 of the rents and profits of the land in controversy which are to be tried by a jury if required by either party.

This action came regularly on for trial upon the issues formed by the complaint and the defendant's answer thereto before the Court with a jury on the 19th day of April, 1897. A jury of twelve men were duly empaneled in said case.

E. WORMOUTH.

E. Wormouth, the plaintiff, was sworn in his own behalf, and testified as follows:

I am the plaintiff in the case and know the land in controversy. I am 74 years old and am a native of the State of New York and have been in possession of part of that land since the 1st of March, 1859. I was living there with my wife on the 20th day of May, 1881. Counsel for plaintiff here offered and read in evidence the homestead entry made May 20th, 1881, being the same in this bill of exceptions before mentioned and described.

Witness resuming. I remember making that homestead entry. It is not all enclosed. It is for the same land I settled upon in 1859. I was living there with my family when I made that entry.

Counsel for plaintiff here offered and read in evidence the certified copy of the Register and Receiver's receipt for the purchase price of the land, being the same receipt and which is in this Bill of Exceptions set forth.

Witness resuming. That is a receipt for the same land upon which I settled in 1859, and upon which I am on now. I am in possession of a part of it.

Counsel for plaintiff here offered in evidence a duly certified copy of the certificate of purchase for said lands, being the same hereinbefore set forth in this Bill of Exceptions.

That is a receipt for the same land; I am the man that paid

for it; I am the person spoken of as Ebenezer Wormouth.

The land described in the complaint is the same described in these papers that have been introduced in evidence;
161 in 1859 I got into possession of that land by buying out a man named Sam Worn that lived there; he had a house and improvements on it; I bought all his right, title and interest in and to all those things he had there; I went on there as a settler; I settled there; I don't know how it turned out; I didn't know whether it would turn out to be United States land or anything else; there had been no surveys made then; it turned out to be United States land; then there was a survey made in 1858 and that was thrown out.

This map (Plff's Exh. 1) exhibited to me shows the land described in the complaint; the land that I have been in possession of from 1859 down to 1891 is shown by the dotted lines; there is a road cutting it in two; that yellow line is the outside boundary of the piece of land described in the Certificate of Purchase; it is the whole 46 acres; that is the piece (indicating) that I am in possession of, and I have had possession of that ever since I got it from Worn; the defendants, Peter Gardner and Jacob Gardner, have withheld possession from me of this piece of land outside of the dotted lines from February, 1891, down to this time without my consent, and they are still withholding it from me; they certainly refuse to give me possession; the piece that I am suing for is not the piece that I am in possession of; there (indicating) is the house where I am living; I put that house up myself; I put a barn up two or three years ago; this piece of land lies between the Reed Ranch and the Sausalito Ranch; the Sausalito Ranch is a big ranch of 19,000 acres; the Reed Ranch has some three thousand acres; the line of the Reed Ranch as patented runs from there (indicating on diagram) N. 9 degrees east; here (indicating on diagram) is lot three in Section 28, and here (indicating) is lot three in Section 29; I have lived in that vicinity since 1859; it is on the east side of the boundary line of the Rancho Sausalito.

I know what that land has been renting for—for camping purposes and so on—for dwellings and other things.

The space a tent would occupy depends on the size of it; 15 by 20 feet; some 12 by 14; I guess 12 by 14 would be an average size, maybe more; the sizes of the tents used over there
162 were different; I don't suppose they averaged over 10x 12; I could not tell exactly what the actual receipts from that land were; I think the rental value of that land oc-

cupied by the Gardners and belonging to me would be worth $50.00 a month from the first of February, 1891, or $500.00 a year; it is about 32 acres or thirty-three; I never saw the Gardners collect rent or either of them, but I am pretty sure they got it of all the campers that were there; there were campers there in the summer season; '93 was the biggest summer; '92 was not so big; I am reading from a paper that I made myself; I could not remember all the tents that were there, and that is the reason I made a memorandum of it; by looking at this paper I can refresh my memory; I made the memorandum in another paper in my book and then I put it on this; it was sometime after I made the memorandum in the book that I put it in this; I have not an original memorandum here; that is the same as the original; it is a copy of it; I have not got the original at home; it is wornout, I guess; I wrote it with a pencil, and then I wrote it over.

In 1893, in the best time, there was 65 or 70 tents there.

I have been kept out of possession from the 1st day of February, 1891, down to the present time. I am out of possession.

Cross-Examination.

I have looked at this map [indicating], and I think that you have looked at it, too. At present that line where your finger is, marked boundary line of the Rancho Corte Madera del Presidio, north nine degrees east, as patented to the Reed heirs February 25th, 1885, that the line represents the patented line of the Rancho Corte Madera del Presidio. The western boundary and the land lying east of that is the land as patented by the United States to the Reed heirs. I first went there in March, 1859. The house that I went and lived in was on land that was patented to the Reed heirs. It was Mexican grant lands, but all of that has been adjudicated by the Land Department. I was living on the east side of this grant line, as patented in 1859, March of that year. I don't remember when I got a lease from Miss Throckmorton, but I didn't get a lease from her for any portion of that land. It is this little corner
in here [indicating]. That was on the grant land; she
163 was the daughter of S. R. Throckmorton, so they say;
they told me so; I don't know when it was I got that lease. I lived on the grant land as patented until 1861 or 2; then the house was burned up. Then I built another one. The second house was on the northwest side of the grant line—the west side of it. The house marked on the map "Wermouth's old house" was the house I built in 1861; that was after the

first one burnt down. Both of those houses were not on the grant line at that time. The Mathewson survey was made—before that survey was made. I couldn't tell you how many years I lived in the second house—in 1881 or '80. On the previous trial of this case, when I was examined as a witness, I am pretty sure I didn't say that I was living on the grant land when I filed my homestead entry on this land. I built that house [indicating] in 1880. I don't think I testified that I built that house when I filed my homestead claim.

Q. Do you remember that the Judge of this Court asked you on your examination in 1885, when you were a witness in this case, the direct question whether you were living on the grant land or whether you were living on government land when you filed your homestead claim, and did you not, in reply to the Judge, say that you were living on the grant land at that time?

A. I don't think so.

Q. On this trial of a case between Mr. Gardner and yourself, which took place on the 12th day of November, 1892, was this question not asked of you?

[Counsel reads:]

"Q. When did you discover for the first time by an actual "survey that the house that you resided in with your family "was not on the land which you now claim?

"A. I could not tell you the year.

"Q. About what year?

"A. I guess maybe ten years ago, more or less; I could not tell exactly."

Was that your testimony, then?

[Judge Mahon.] That is the testimony before the 164 land office.

Q. [Mr. Wilkins.] Did you testify in this way:

[Counsel reads.]

"Q. [The Court.] I want to ask you if you can recollect "any more clearly when you first lived on any of this land "west of the grant land?

"A. [The witness.] I built a house directly after filing a "homestead. I lived right in there three years right along."

Q. Was that your testimony?

A. It may be something like that.

[Counsel reads.]

"Q. After you filed the homestead?

"A. That is, in 1881: around there."

Was that your testimony?

A. It might have been. Then after that I filed the homestead again—after that again.

Q. And then you built the house?

A. I couldn't tell whether I built the house before or after.

Q. Didn't you testify that you built the house afterwards? The testimony here is: "I built the house directly after filing the homestead." Now, I want to know if that is so or not.

A. If I said so, then it must be so. I may have built the house before I filed the homestead.

Q. Did you not testify as follows: "I built a house directly after filing a homestead. I lived right in there three years, right along." Is that not your testimony?

A. Somewheres near that; somewheres like that. I could remember then; better then than I could now. I am certain I think that is correct. I never had possession of the remainder of this land—the 33 acres; but I filed on it and Throckmorton built a fence around it. I never had possession at all of this 32 acres of land which lies outside of the patented line; it was always withheld from me after I got my legal papers.

Mr. Throckmorton first had possession of it; he took possession.

I don't know how many years he had possession, but
165 when he went to fence it I informed him and notified him that I claimed that land. I don't recollect the day of S. R. Throckmorton's death; he died somewhere previous to the decision of the Commissioner in the Land Office. After his death, Miss Throckmorton held possession of it.

This is ordinary land; the same as the general land around here. It is level, with nice oaks through it. It has a natural slope in it; it slopes down toward the creek. I know the land Mrs. Boyle claims to be hers; it adjoins this. I don't know how much per year Mrs. Boyle rents her property for. I know the land owned by the Deffebach heirs; that is further down; farther down.

It is next to Mrs. Boyle's and runs down to the County Road. I think there are somewheres around five or six hundred acres there. I don't know how much that land rents for. I know what I have been offered for my land. I know where Dr. Warner's land is; it is right next to Mrs. Boyle's land; I couldn't tell how many acres there are there; I suppose 160, more or less. I don't know the rental value of the land; I wouldn't give much of anything for it myself. I don't know the rental value of Mrs. Boyle's land only what I have heard

it has rented for. I never hired any land or rented any; I know what I could have got for my place if I had possession of it. Mrs. Boyle's land is adjoining mine; it is further back. It depends on the location a good deal; if that piece of land I own was forty or fifty miles from here, up in the hills, it wouldn't be worth anything; the Shelley tract has five or six acres; Mrs. Boyle's comes along there on the same county road as mine; it is between Alto Station and Mill Valley; Mrs. Boyle's property has hills and trees on it, but it isn't so near to town; some of it has plenty of water on it, and some of it ain't. It is not near Millwood Station; I couldn't tell how far her property is from Millwood Station, but there is a piece of land between, and a road; I don't know that they have a roadway reserved in the deed by which they can get through the property; it is all fenced; they don't always cross there; a man could cross that property on foot and climb a barbed wire fence; there are no gates.

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Re-Direct Examination.

That line (indicating the red line on plaintiff's map Exh. 1) is what is known as the Matthewson survey; that is, a survey of the Reed Ranch that was made in 1858 or '59. After I bought from Worn, there were the improvements upon the land that I claim—a barn was there and all the fencing was there. The first house was there. After the Mathewson survey was made, that took in the house that I bought from Worn. That burned up, and then I put up that one there (indicating). That was outside of the Mathewson survey on public land, then; that was in 1861, or somewhere along there. Then I built a house on the west side of the Reed Ranch line that is patented.

When I built the first house there, I was under the impresson that it was public land, because it was surveyed out by Mathewson and laid that way for several years; the Mathewson survey of the Reed Ranch excluded this (indicating). I lived in that second house for quite a number of years and then built another house where they changed that survey. When they changed the survey and made it run north nine degrees east, then I built on the west side of the Reed Ranch westerly line. That was about '80. That is the way I remember it now. That was all in the same inclosure I had originally in 1859.

The map was here put in evidence and marked "Pl'ff's Exh. 1."

The 46 acres tract means all of this piece (indicating) that is included in my certificate of purchase; that whole piece is included in what I call the homestead entry; I have been living in this house (indicating) from 1880 or thereabouts—1881 anyway; there is another house that I built before I built this one (indicating) that is in here; this on the east is the Reed Ranch, and the place that I have been living on from 1881 down to the present time is on the west side of the boundary line of the Reed Ranch, and on this land that I bought from the United States.

167 The piece of land that I leased from Susanna Throckmorton is not included in any of the land that is described in my certificate of purchase—not an inch of it.

This is the road leading to Mill Valley; it used to be called the Blythedale road, but it is a county road now; there is a creek along this line, here (indicating). This is the Mathewson survey (indicating). There is station 181 and 180; all of this (indicating) at that time was considered public land; afterwards they surveyed this land over here and threw it into the Reed Ranch, cutting off a piece of this public land.

Q. All that you are suing for and all that is described in your certificate of purchase was public land?

A. Yes, sir.

When I first filed Mr. Throckmorton started this contest. He pretended he wanted and claimed the land as an innocent purchaser, from the Reeds, Bolton, Deffebach and a good many others. I filed another entry and afterwards I disregarded that, and I filed my homestead. Both entries that I made were for that same land. It was a United States homestead entry filed in the United States Land Office in San Francisco.

Re-Cross-Examination.

That (marking on diagram on board) is the house that I bought in 1859; that was burned up in about '61 or '62, and then the Mathewson survey was made, and then I bought one, right somewheres in there (marking). That was on the grant land. There is a fence along here (indicating). It was a good rail fence at that time. Throckmorton went and built a picket fence outside of it, and then I didn't fix the rail fence, and then Gardner had campers around there and they stole the fence and burnt it up.

GRANT OF JURIDICAL POSSESSION.

Defendants' counsel here offered and read in evidence the Mexican grant from Jose Figueroa, Governor, of the
168 Rancho Corte Madera del Presidio, the petition for said grant by Juan Reed, and the testimony of juridical possession, all of which papers are before mentioned, described and set forth in this Bill of Exceptions. And in addition thereto, the following act of juridical possession and measurement by the Constitutional Alcalde Haro, to wit:

Being in the field and lands pertaining to the Rancho Corte de Madera del Presidio of Juan Reed, Saturday, the 28th day of November, 1835, I, the Constitutional Alcalde of the Port of San Francisco di Assis, acting in virtue of my office, with two assisting witnesses, for want of a notary public, present citizen Jose Antone Galindo and the Indian Neri, appointed measurers by the parties and by the colindantes, I ordered them to proceed with the measurement of one square of land which, a little more or less, pertains to the Rancho Corte de Madera, according to the title and the map presented, in obedience to which, having again measured and examined the rope, they commenced said measurements from the solar which faces west and standing at the slope and foot of the hills, which lie in that direction, and on the edge of the forest of redwoods called "Corte de Madera del Presidio" they commenced said measurements, and going from the south to the north, they measured to an arroyo called Holon, where is another forest of redwoods called "Corte de Madera del Pablo" 90 cordeles of 50 varas, and the person interested, fixing there a known point as a mark, said that he placed a bound; from this point, taking a direction from north to south, the measurement was continued to Point Tiburon and they measured 200 cordeles and the said point, serving as a mark and limit, he promised to place there a corresponding bound. Thence, continuing the measurement, from east to west to the mouth of the canada and the point of the Sausal, which is near the estero, lying east of the house of person interested, which is at present on the rancho; there were measured 94 cordeles, and from this last point continuing the measurements from east to west along the last line to the place of beginning, they
finished by measuring 16 cordeles, so that the square
169 league of land which the Rancho Corte de Madera contains forms a square, a square of twenty thousand Castilian varas, which, being regulated by said measurers, they

declared citizen Juan Reed to be informed of the lands which belong to his ranch according to the title and map at the head of this expediente, so that no third party is injured.

Wherefore, said citizen, Juan Reed, pulled up various herbs and stones and threw them to the four winds in sign of his legal and legitimate possession; and at this period the Constitutional Alcalde ordered said Reed, for permanence and clearness of the boundaries which have been mentioned, to make, at his own cost and expense, bounds of masonry more than a vara high, that it might in all time appear, they be observed and kept as limits and boundaries of his lands by the others, neighbors thereto. And he prayed for a testimony that the said measurements were made quietly and peaceably without contradiction by any person, and I, the Constitutional Alcalde for the Port of San Francisco, acting in virtue of my office, with two assisting witnesses, for want of a notary public, give it, that everything was done as has been said, and that the aforesaid measurements were executed to the best of the knowledge and understanding of the said measurers as they deposed without deceit or fraud against any other person; and for greater security and the ratification of the oath which they have made, they did not sign, not knowing how, and those who knew how and were present did so before me and those of my assistants.

[Signed.] FRANCISCO DE HARO,
MANUEL SANCHEZ,
JOSE DE LA C. SANCHEZ,
FERNANDO FELEZ,
THOMAS JEREMIA JONES.

Attesting Witnesses:
EUCEBIO GALINDO,
FRANCISCO SANCHEZ.

STIPULATION.

176 (Admitting in Evidence All Documentary Evidence in Evidence in Equity Branch.)

It was here stipulated and agreed by and between counsel for plaintiff and defendants, that all the documentary testimony that was received upon the trial of the equitable issues shall be considered as before the Court; that portion of it that was offered by the defendants to be here considered as offered by them, and that portion that was offered by the plaintiff to be considered here as offered by plaintiff.

PETER GARDNER.

Peter Gardner was then called and sworn as a witness in defendants' behalf and testified as follows:

Direct Examination.

I am one of the defendants in this action. I first knew the land in controversy in 1852 or 1853. That was the time when I first came to Marin County. I have known the land ever since. I have examined the Mexican Grant, the testimony of juridical possession, and all these papers and documents relating to the grant. I commenced that examination in about 1865. I became familiar with them at that time. I know the terms of this Mexican Grant. I erected improvements upon this land in controversy. I erected a house, and I did some fencing over there. At or about the time of the erection of that house, I believed that this land was within the boundaries of the original grant from the Mexican Government to Juan Reed. My opinion at that time was that the Corte Madera del Presidio Creek constituted the western boundary of that grant. (Witness here points out location of creek on the desino from the Mexican archives of the grant.) I know the Arroyo Holon on the other side. The sources of the Arroyo Holon and the Arroyo Corte de Madera del Presidio are not very far apart. According to my judgment of the construction of that grant the Arroyo Holon constituted the northern boundary of that grant. (Witness here explains to the jury from
171 said desino.)

I went into possession of that land under my brother Jacob Gardner. The house I put on that land cost a little over $600.00. Tht was built before the commencement of this suit, in the year 1890 or 1891—it was built in '90—after the deed from Miss Throckmorton to my brother Jacob Gardner. I fenced all along up the creek with wire fencing; that cost about $15.00.

I knew the claims which S. R. Throckmorton had made to this land. I understand and knew the chain of title from the Reed heirs to S. R. Throckmorton at that time. They all claimed this land as part of the Corte Madera del Presidio Ranch, and my brother and I claimed it in the same way. During the year 1891 to the present time I have been familiar with the rental value of that land. I should say $150.00 a year was a fair rental.

The house I built on that land was a 20x14, 12-foot studding, rustic with awning all around it. It is not all finished inside. There are three rooms finished at present. A portion of it is not partitioned off. It is a one-story house. It has a tongue and groove 1x6 flooring around it. I am living in this house at this time. There was a couple of other houses on that land which I erected.

I never did any other fencing except what I mentioned.

Cross-Examination.

On the 12th of May, 1885, I was a witness for Mr. Throckmorton before the Register and Receiver—I should say, for Mr. Wermouth, when he was making his homestead proof.

[Counsel here reads as follows]:

"Peter Gardner being called as a witness in support of the "Homestead Entry of Ebenezer Wermouth for lot 3, section "28, and lot 3, section 29, township 1 north, range 6 west, "Mount Diablo Meridian, testified as follows:

"Q. What is your occupation and where is your place of "residence?

"A. I am a farmer and reside in Marin County, Cali-
172 "fornia.

"Q. 2. Have you been well acquainted with "Ebenezer Wermouth, the claimant in this case, ever since he "made his Homestead Entry No. 4415?

"A. Yes, sir.

"Q. 3. Was claimant qualified to make said entry? State "whether the settler was a citizen of the United States, over "the age of 21 years, or the head of a family, or whether he "ever made former homestead entry.

"A. Yes, sir. He was over 21 years of age; a native-born "citizen of the United States. He was a married man, had a "wife; never made a former homestead entry to my knowledge.

"Q. 4. When did claimant settle upon the homestead and "at what date did he establish actual residence thereon?

"A. Prior to 1860; went there to reside prior to 1860. He "has a house 20x12 feet, a barn 30x12, chicken houses, sheds "and some fencing, total value about five hundred dollars.

"Q. 5. Have claimant and family resided continuously "on the homestead since first establishing residence thereon?

"A. I think so. I have been away for about two years. "He was living there when I went away and I found him there "when I returned.

"Q. 6. For what period or periods has the settler been "absent from the land since making settlement, and for what "purpose, and, if temporarily absent, did claimant's family "reside upon and cultivate the land during such absence?

"A. Not any that I know of.

"Q. 7. How much of the homestead has the settler culti- "vated, and for how many seasons did he raise crops thereon?

"A. About five or six acres; raised a crop for several "years; he grubbed about five or six acres and raised a crop on "that; used it since for pasturage.

"Q. 8. Are there any indications of coal, salines, or min- "erals of any kind on the homestead? If so, describe what "they are, and state whether the land is more valuable for "agriculture than for mineral purposes.

173 "A. Not that I know of.

"Q. 9. Has the claimant mortgaged, sold or con- "tracted to sell any portion of said homestead?

"A. Not that I know of.

"Q. 10. Are you interested in this claim, and do you "think that the settler has acted in entire good faith in per- "fecting this entry?

"A. Not any; I think so.

"[Signed.] PETER GARDNER."

Q. That is your testimony given on that occasion?

A. [The witness.] Yes, sir. I had no interest in this land in controversy at that time.

[Counsel read as follows]:

"Continuance of Direct Testimony of Peter Gardner by "Mr. Stuart.

"Q. Please examine the map Exhibit 'C' Throckmorton "and find out where, if you can, Wermouth's first, second and "third houses were and are located thereon, if you know, if "any such houses have been located thereon and now being "on the land?

"A. The one shown on this map is the second house; the "first was burned down; it stood a few feet south of this one; "the third house is not shown on this map; the third house is "about 100 or 150 feet northwesterly from the second house "across the yellow line shown on this map.

"Q. Do you know what this line would indicate?

"A. It is the enclosure of Wermouth marked 'long fence.'

"Q. Do you know whose barn that is marked 'barn' within "that enclosure?

"A. Yes, sir; it is Wermouth's

"Q. Is the line of the Rancho Corte Madera del Presidio "now marked as the western boundary line of said ranch the "line of the survey of that ranch when Wermouth located his "first two houses, and, if not, please state how far or where "the said line came?

"A. That line was not run when Wermouth built his first "two houses.

"Q. Were not the land on which these two houses were "built considered public lands at the time these houses were "built?

174 "A. Yes, sir."

Q. Is that correct?

A. Yes, sir.

In 1865 I was acquainted with the location of that grant as shown on that desino.

Q. Now, then, you don't mean to contradict the testimony that you gave there that the western boundary line of the rancho at that time extended over to this creek here that you spoke of?

A. No, I don't mean to contradict it; there is something I would like to explain about the location of those little houses on that line. The Mathewson survey was made and they throwed this (indicating) off as public land.

Q. I want to know, if you knew that land in 1865, whether you thought at that time that the line of the Reed Ranch extended over here instead of here (indicating)?

A. The survey didn't, but the grant did. I said it was marked as public land. At the times these two houses were built the lands on which they were built were considered public lands, and it was so marked on the public surveys.

At the time the deed which is in evidence was executed and delivered to Jacob Gardner by Miss S. R. Throckmorton I was familiar with the proceedings in the land office about this land. I knew at that time that there had been a contest before the Register and Receiver of the land office about this land between Throckmorton on the one side and Wermouth on the other; I knew that the contest was going on. I knew the Register and Receiver had decided in favor of Mr. Wermouth; I knew that there had been an appeal taken by Mr. Throckmorton from that decision to the Commissioner of the General Office, and that the Commissioner of the General Land Office had again decided in favor of Mr. Wermouth. That was before I put up any improvements. I put up the improvements shortly after the date of the deed.

When these two houses were built that public land (indicating) was over there; this (indicating) was also considered public land.

175 I remember testifying that there was eight hundred or a thousand yards of space between the sources of the Arroyo Holon and the Arroyo Corte de Madera del Presidio, and that there is a ridge running between them. I pretty near finished it then. I put up on partition one time and another another. Somewheres along in '92 or '93 I put up little additions to it. I know the decision of the Secretary of Interior that was rendered in October, 1891. This house was finished before the decision of the Secretary of Interior.

Re-Direct Examination.

Q. In testifying in the land office as to this land being considered as public land, did you refer to the surveys, or did you refer to the original grant of the land?

A. I referred to the surveys. I meant to say that it had been so surveyed by the authorities and declared public lands.

Q. Did you have any different opinion ever then than you have to-day in relation to where the lines of that Mexican grant were?

A. When I made that discovery—the full discovery of this thing by me came on in the contest in the Surveyor-General's office the same time they were trying to set aside the Mathewson survey. I think it was about '76; I am not sure; it was the time that contest was going on. I refer to the discovery about the location of the Mexican grant as I have testified to here. I was trying, also, to give an explanation about where they first located those houses. At that time the fence was run to what I call a madrone tree. At that time the madrone tree was a bearing tree, and I understood by running the fence to the line, they run to the bearing tree.

From that time I never changed my mind or opinion as to where the true line of the Mexican grant was. I can not remember the date exactly, but to-morrow morning, when I have a chance to look at some papers, I can tell exactly.

JACOB GARDNER.

176 Jacob Gardner was then called and sworn as a witness in his own behalf and testified as follows:

I am one of the defendants in this case. I am the same per-

son who was mentioned in the deed from Susanna Throckmorton to Jacob Gardner. I have known the land in controversy since 1867. I have had charge of it for the last ten years for Mr. S. R. Throckmorton—during the last ten years of his life. He died in 1883. I had charge of it after his death.

During his lifetime Boratras had charge of it. I acted as agent for Mr. Throckmorton. I took charge of all his land occupied by his tenants and this land came under my supervision as well. He had this land leased to Boratras. I did not take charge of that portion.

When I purchased the land from Miss Throckmorton, I believed she was within the Mexican grant from the Mexican Government to Juan Reed. I heard Mr. S. R. Throckmorton during his lifetime say that he claimed that land under the grant of the Mexican Government. I don't know as I ever heard her (Miss Throckmorton) say one way or the other as to her claim. I have read these Mexican grant papers and had read them before my purchase.

At the time I purchased from her and at the time this house was constructed upon this property I supposed this land was within the exterior boundaries of the Mexican grant. I have ever since entertained that belief. I know the house that was erected by defendants in, I think, the year 1890. I should say, in my judgment, that that house is worth about $500.00.

I have been engaged in renting lands there and collecting rents since '68 with the exception of five years that I was absent somewheres. I have been familiar with the rental lands in Mill Valley. From the first of February, 1891, to the present time I have been familiar with the rental value of this land in controversy. In my opinion the rental value of that land is about $15.00 a month; that is, from the first day of April down to the present time. All the year round.

Cross-Examination.

I am one of the defendants in this case. The deed from Miss Throckmorton to me is dated July 17th, 1890. That
177 deed includes also the fifteen acres that Mr. Wermouth has possession of, and which he has been in possession of since 1859. I knew at the time I purchased this land that Mr. Wermouth was living on a piece of it, and claiming it; that he claimed this 46 acres. His barn was built there afterwards; there was a little shed there. The barn was not on that place, it was on another place; it was on a portion of the

Mathewson survey; that is, on the west side of the boundary of the Reed Ranch. There was a barn there when I went there. There was a barn there when I bought in 1890; that barn was there about 1862, and that is a part of this same property.

I knew that he filed an entry in the United States Land Office about May 18th, 1881, for this same property. I knew there was a contest between Mr. Wermouth and Mr. Throckmorton about this same land; I knew that the matter had been heard before the Register and Receiver and that he had decided in favor of Mr. Wermouth. I think the Mathewson survey was made before I came to California.

I knew the Mathewson survey didn't include the land in controversy.

I also knew that an appeal had been taken by Mr. Throckmorton from the decision of the Register and Receiver to the Commissioner of the General Land Office at Washington and that the Commissioner had decided in favor of Mr. Wermouth.

I also knew that a final survey of the ranch had been made and that a patent issued for it in 1885. I knew that the Reed Ranch line didn't take in any of this land. Mr. Throckmorton died in 1883 and his daughter succeeded him. It was from her that I bought this land. If I was successful, I was to pay her $100 an acre; and if I wasn't successful I was not to give her anything. So far, I have not given her anything to speak of. I know land situated near Mill Valley and of half as good quality as this that will rent for $15.00 an acre; that is Boyle's place; it is adjoining this. It is not quite as near as this land. This place lies between them and the station. It is about the same character of land; if anything, it is better land. I
178 arrive at the conclusion that it is only worth $15.00 a month by the land adjoining. I don't know what my brother collects; I own 28 acres and I know what I get for that. I know whatever he got he kept. I rented land for camping purposes, but not on this land. I am adjoining it. I have 28 acres north of it near Cushing's. My land is pretty hilly. I saw lots of tents there. I don't know how many. I don't believe my brother 1800 or 1893 of that land.

Re-Direct Examination.

I saw the tents west of the county road. I suppose four or five acres was used for tents. The tents stood all over in different places.

On the 20th of May, 1881, I think Mr. E. Wermouth was living on patent land, that is, the land patented to the Reed heirs. This house was on that land.

Re-Cross-Examination.

I know that his house in 1881 was not where it is now; it was on the patent line at that time. I don't know who he bought the house from that he lived in. I knew him as early as '59. That (indicating) was the house he was living in. That house was on what is now a part of the Reed Ranch.

Q. Now, there was another house built there in 1861 or 2?

A. I don't know. I wasn't there in 1861 or '2. I didn't go there until 1867. He was living in that house (indicating) in '67 until he built the one which he is living in now.

He built a small house 12 by 12; he lived in one of the houses part of the time and in the other the other. He built a house on the west side of the ranch line. The small house was about fifty feet from the house he was living in in 1867. All of these houses were close together. There was no enclosure at that time. There was an enclosure all round the whole property. It wasn't put there by Wermouth. It was property that he was exercising acts of ownership over; he claimed it to be his house, his barn and his place. He was occupying that.

He built that house (indicating) about the time he
179 moved from the ranch proper; it was about '80 or '81.

Five or six months he would be in one and then in the other; moving backwards and forwards in one and then the other. One was on the east side of the ranch line and one was on the west.

The final line was not established until 1885. He was occupying it, moving backwards and forwards all the time. He was in one or the other of these two houses and was within the general enclosure that he had there.

Defendants here rested.

The foregoing is the testimony given in the case on both branches thereof, material to the exceptions taken by defendants, and the exceptions and objections of the defendants on the ground of insufficiency of evidence relied on by defendants herein.

The case was thereupon argued by counsel for the respective parties, and the Court instructed the jury as follows:

FINDINGS ON LEGAL ISSUES AND INSTRUCTIONS TO JURY.

In this action the plaintiff, Ebenezer Wormouth, seeks to recover from the defendants, Jacob Gardner and Peter Gardner, the possession of certain land, with damages for its detention since February 1st, 1891.

The land in controversy is the 46.26-100 acre tract described in the complaint, excepting therefrom the two parcels described in the answer, of which two parcels it appears the plaintiff was at the time of the commencement of the action and ever since has been in possession.

The plaintiff alleges that he was on February 1st, 1891, and ever since has been the owner and entitled to the possession of the land in controversy, which is denied by defendants.

It has been duly stipulated between the parties to this action that all of the issues made by the pleadings in this action shall be tried and determined by the Court sitting without a jury, excepting only the issues as to the damages
180 claimed by plaintiff and as to the value of the rents and profits of the lands in controversy, which are issues to be determined by you.

Determining the issues to be disposed of by it, the Court now finds the following facts from the evidence introduced on this trial, viz:

1st. That on the 1st day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26 chains, more or less to the creek on the eastern boundary of the Rancho Saucelito; thence descending said creek to the point of beginning; being lot 3 of Section 28, and lot 3 of Section 29, township No. 1 north of range No. 6 west, M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments

and appurtenances thereunto belonging or in anywise appertaining.

2nd. That on said 1st day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same, and ousted and ejected the plaintiff from the same (except those portions thereof bounded and described as follows):

"A"-- Beginning at a post marked "C. M. P. 180"; running thence due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east to a road known as the Blythedale road; thence northwesterly along said road about 10 chains to a fence; thence southwesterly along said fence to the said creek; thence descending the said creek to the point of beginning.

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"B"—Commencing at the point of intersection of the westerly boundary line of the Rancho Corte Madera del Presidio with the northerly line of the said Blythedale road; running thence north 9 degrees east along said line of said rancho to a fence which runs north 8 degrees 10 minutes west from the said line of said rancho; thence along said fence north 8 degrees 10 minutes west 514.5-10 feet, north 14 degrees 30 minutes west 160 feet to a fence running at an acute angle from said last fence; thence along said fence running at an acute angle south 8 degrees 30 minutes west 277.5-10 feet; south 16 degrees 55 minutes west 143.7-10; south 22 degrees 11 minutes west to the said northerly line of said Blythedale road, thence southeasterly along the said northerly line of said road to the place of beginning.

And ever since has been wrongfully and unlawfully withheld and still withold the possession thereof from plaintiff.

The above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs you that your verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, i. e., all of the said 46.26-100 acre tract described in the Complaint. Save and except the two parcels thereof which are now in plaintiff's possession.

Counsel for the defendants thereupon, before the jury retired, excepted in open Court to the following portions of the instructions to the jury, to-wit:

1st. To that portion of the instructions in which the Court instructed the jury that on the 1st day of February, 1891, the

plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of the land described in the plaintiff's complaint and also described in the said instruction.

182 2nd. To that portion of the instructions in which the Court instructs the jury that the above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs the jury that their verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, i. e., all of the 46.26-100 acre tract described in the complaint, save and except the two parcels thereof which are now in plaintiff's possession.

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL.

On the 27th day of April, 1897, and within the time allowed by law, the defendants served and filed their notice of intention to move for a new trial, of which the following is a copy:

[Title of Court and Cause.]

To E. B. Mahon, Esq., and
L. D. McKisick, Esq.,
Attorneys for Plaintiff.

Please take notice that the defendants above named intend to move and will move the above-entitled Court to set aside and vacate the decision of the Court, the verdict of the jury and the judgment heretofore entered herein and to grant a new trial of said action, and a new trial of all of the issues made by the cross-complaint of the defendants and the answer thereto of the plaintiff and the supplemental answer of said defendants, and all the issues determined and decided by the Court upon the plaintiff's complaint, and the answer of the defendants thereto, and all the issues submitted to and determined by the jury in said motion, and that said motion will be made upon the following grounds, to-wit:

1st. Insufficiency of the evidence to justify the decision of the Court in said action.

2nd. Insufficiency of the evidence to justify each of the decisions of the Court in said action.

3rd. Insufficiency of the evidence to justify the verdict of the jury in said action.

183 4th. That the decision of the Court in said action is

against law, and that each of the decisions of the Court therein is against law, and that the verdict of the jury in said action is against law.

5th. Errors of law occurring at the trial and excepted to by the plaintiff.

6th. Misconduct of the jury.

7th. Excessive damages appearing to have been given under the influence of passion and prejudice.

Said motion will be made on a Bill of Exceptions to be hereafter prepared, served, settled, allowed, signed and filed as provided by law and upon affidavits.

HEPBURN WILKINS,
Attorney for Defendants.

Thereafter, in due time, the defendants served their bill of exceptions on their motion for a new trial and on their appeal from the judgment herein.

Specifications of Insufficiency of Evidence.

The defendants now specify the following particulars in which the evidence is insufficient to justify the decision and findings of the Court upon the issues formed by the cross-complaint of the defendant, Jacob Gardner, and the plaintiff's answer thereto, and the supplemental answer of the defendants herein—and upon which defendant will rely upon their motion for a new trial and their appeal from the judgment herein, to-wit:

1st. The evidence is insufficient to justify the second findings of the Court to the effect that one of the questions decided by the United States Register and Receiver and confirmed by the United States Commissioner of the General Land Office and by the United States Secretary of the Interior, in the contest of Throckmorton vs. Wormouth, mention in the 20th paragraph of said cross-complaint, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed, and there is no evi-
184 dence to support said finding.

2nd. The evidence was insufficient to justify the third finding of the Court that the officers of the United States Land Department, to-wit: The Register and Receiver, the Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact upon the evidence produced before said Register and Receiver upon said contest,

was not included in said original grant by the Mexican Government to Juan Reed, and there is no evidence to support said finding.

3rd. The evidence is insufficient to justify that portion of the fifth finding of the Court, in which it is found that the consideration paid by J. Clinton Bolton to the Reed heirs (John J. Reed and others) for the deed to him of 1865, was not a money consideration, and that the only consideration which passed from said Bolton to said grantors was the agreement by said Bolton mentioned in said fifth finding, and there is no evidence to support said finding.

4th. The evidence is insufficient to justify the sixth finding of the Court to the effect that the officers of the United States Land Department, to-wit: The United States Register and Receiver, the Commissioner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in the said contest of Throckmorton vs. Wormouth, in denying said application of Throckmorton, did not base their decision upon a question of law alone, but did find and decide as a fact that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, but on the contrary the evidence showed that the said officers of the United States Land Department based their decision in the said contest upon a question of law alone and did not find and decide that the said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns and there is no evidence to support said finding.

5th. The evidence is insufficient to justify and there is no evidence to suport that portion of the seventh finding of the Court, wherein it is found that the rancho granted by
185 the Governor of California under the Government of Mexico to Juan Reed, did not include within its exterior limits the land described in the deed from T. B. Deffebach et al., to Julius C. McCeney, of February 14th, 1871, or any part thereof, except so much as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al.; and the evidence is insufficient to justify and there is no evidence to support that portion of said seventh finding wherein it is found that the grant mentioned in the first paragraph of said cross-complaint did not include any part of the land in controversy in this action, and that no grant ever made by the Mexican Government to Juan Reed or to his successors in interest, included any part of the land described and granted to the plaintiff by the United States

patent mentioned in the 22nd paragraph of said cross-complaint.

6th. The evidence is insufficient to justify and there is no evidence to support the eighth finding of the Court to the effect that the land described in said deed from T. B. Deffebach et al., to Julius C. McCeney, or any part thereof, except as in the seventh finding of the Court set forth, was not within the exterior boundaries of said Mexican grant.

7th. The evidence is insufficient to justify, and there is no evidence to support, that portion of the ninth finding of the Court to the effect that the consideration mentioned in the fifth finding of the Court was the only consideration for the deed mentioned in the said ninth finding.

8th. The evidence is insufficient to justify, and there is no evidence to support, that portion of the tenth finding of the Court in which it is found that neither T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle nor H. C. Newhall, did, on the 1st day of February, 1871, or at any other time, own, or was or were entitled to convey to any one, any of the land described in the 16th paragraph of said cross-complaint, except a small part thereof which is described in said tenth finding.

9th. The evidence is insufficient to justify and there is no evidence to support that portion of the eleventh finding
186 of the Court, which is to the effect that Julius C. McCeney, on the 19th day of January, 1875, or at any other time, was not the owner and was not entitled to convey any of the land mentioned and described in the deed from said McCeney to said Throckmorton, described in said eleventh finding, save and except the portion of said land which lies within the boundary of said Reed patent.

10th. The evidence is insufficient to justify and there is no evidence to support that portion of the twelfth finding of the Court, which is to the effect that none of the grantees named in the deeds mentioned or referred to in the 18th paragraph of said cross-complaint, purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy except as trespassers upon the possession and rights of the plaintiff as alleged in his complaint in this action, and that neither the said Throckmorton or his executrix ever had any right to use or improve any part of said lot 3 in Section 28 or of said lots 2 and 3 in Section 29, and neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof except as intruders and tres-

passers upon the rights and possession of the plaintiff.

And the evidence is insufficient to justify and there is no evidence to support that portion of said twelfth finding which is to the effect that said grantees and each of them and particularly the said Throckmorton, did not believe in good faith or at all believe that all of the lands conveyed by the said deeds or any part or parcel of said lot 3 in Section 28 and said lots 2 and 3 in said Section 29, were included within the said Mexican grant, and that said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3, in section 28, and lots 2 and 3, in section 29.

11th. The evidence is insufficient to justify the following portions of the thirteenth finding of the Court, to-wit:

(a) It is insufficient to show and there is no evidence to show that the evidence introduced in the matter of the application and contest mentioned in the nineteenth para-
187 graph of said cross-complaint did not show without conflict, that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true, but, on the contrary, the evidence did show that all of said facts mentioned were true.

(b) It is insufficient to show and there is no evidence to show that the evidence introduced in the matter of said application and contest did not establish all of said facts or any material fact in favor of said Throckmorton's right to purchase said land by competent, or any, evidence, and that there was conflict in said evidence, and that there was evidence on said contest that contradicted said Throckmorton's evidence, and that the evidence alleged in said cross-complaint was not true, but, on the contrary, said evidence did establish all of said facts in favor of Throckmorton's right by competent evidence and without conflict, and there was, in fact, no evidence of said contest which contradicted Throckmorton's evidence, and it fully appeared from the evidence that all the evidence, as alleged in said cross-complaint on said contest, was true.

(d) It is insufficient to show and there is no evidence to show that the Register and Receiver of the Land Office at San Francisco did not, nor did either of them, on the 9th day of February, 1866, or at any other time, based their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict, but, on the contrary, the evidence fully shows that said Register and Receiver did, on the said 9th day of February, 1886, base their

and his decision fully and precisely upon the evidence as the same is alleged in said cross-complaint and upon evidence without conflict.

(e) It is insufficient to show and there is no evidence to show that the Register and Receiver did not, nor did either of them, rest their or his decision upon the proposition or upon a proposition, of law, that the said Throckmorton was not in law, or under the law, entitled to purchase the said land, and that the Commissioner of the General Land Office, on
188 appeal from the decision of the Register and Receiver, upon the, or upon a, proposition of law in deciding that Throckmorton was not entitled to purchase the said land, and that the said Secretary of the Interior did not rest his decision affirming the decision of the Commissioner of the General Land Office, upon the, or upon a, proposition of law, and that the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of Throckmorton vs. Wormouth, that said Throckmorton was not a bona-fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint, but, on the contrary, the evidence showed that each of the said officers of the Land Department, to-wit: the Register and Receiver, the Commissioner and the Secretary of the Interior, based his decision and each of said respective decisions upon the proposition of law to-wit: the proposition that upon all the facts set forth in said cross-complaint, which were duly established before said officers, and each of them, the said Throckmorton was not in law, or under the law, entitled to purchase the said land.

12th. The evidence is insufficient to justify and there is no evidence to support that portion of the fourteenth finding of the Court, which is to the effect that the said Throckmorton was not a bona-fide purchaser from Mexican grantees or their assigns, and was not entitled to purchase the said land or any part thereof under said act of Congress, and that the Register and Receiver of said Land Office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow plaintiff to make proof and payment for the said land, but on the contrary, the fact was and the proofs before said officers showed without conflict that said Throckmorton was a bona-fide purchaser from Mexican grantees and their assigns and was entitled to purchase the said land and every part thereof under said act, and the Register and Receiver of the Land Office did, contrary to law, basing their de-

cision on an erroneous construction of the law appli-
189 cable to the case before them, allow the plaintiff to
make proof and payment for said land, and hold in substance that all of the facts set forth in the cross-complaint herein did not entitle said S. R. Throckmorton to purchase said land.

13th. The evidence is insufficient to justify ,and there is no evidence to support that portion of the fifteenth finding of the Court, which is to the effect that said Susanna M. Throckmorton was not the owner of the said land when she executed the said deed and that she was not entitled to convey the same to said Gardner.

14th. The evidence is insufficient to justify and there is no evidence to support that portion of the sixteenth finding of the Court which is to the effect that Jacob Gardner did not on the 17th day of July, 1890, or at any other time, enter into the possession of said land under said deed or remain in the possession thereof except an an intruder and trespasser.

15th. The evidence is insufficient to justify and there is no evidence to support the seventeenth finding of the Court to the effect that said Jacob Gardner is not and never was the owner in equity of said land or any part of the land described in plaintiff's complaint in this action and which is also described in the United States Patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22nd paragraph of said cross-complaint, and that said plaintiff does not hold said land or any part thereof in trust or otherwise or at all for defendant, Jacob Gardner.

The defendant further specifies the following particulars in which the evidence is insufficient to justify the decision and findings of the Court as contained in its instructions to the jury upon the issues formed by the plaintiff's complaint and the defendants' answer thereto on which defendants will rely on said motion for a new trial and appeal, to-wit:

1st. The evidence is insufficient to justify and there is no evidence to support that portion of the findings of the Court contained in said instructions, in which the Court finds that on the 1st day of February, 1891, the plaintiff, Ebenezer Wor-
mouth, was and for a long time prior thereto had been
190 the owner of and in the possession of and entitled to
the possession of and from thence hitherto has been the owner of and entitled to the possession of the land described in the plaintiff's complaint and also described in said instructions.

2nd. The evidence is insufficient to justify and there is no evidence to support that portion of the findings of the Court contained in said instructions in which the Court finds that on the 1st day of February, 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said lands and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same and ousted and ejected the plaintiff from the same, excepting the portions described as "A" and "B" in the said instructions and in the answer of defendants, and ever since wrongfully withheld and still withholds the possession thereof from plaintiff.

The defendants further specify the following particulars in which the evidence is insufficient to justify the verdict of the jury, and on which they will rely on their said motion for a new trial and appeal, to-wit:

1st. The evidence is insufficient to show that the plaintiff ever was the owner of the land in controversy or any part thereof, or that he ever had any title thereto.

2nd. The evidence is insufficient to show that the plaintiff ever was in the possession of any part of the land described in the complaint except the two portions thereof described in defendants' answer and designated therein as "A" and "B."

3rd. The evidence is insufficient to show that the plaintiff was damaged by the withholding of the land described in the complaint, in the sum of $2000.00 or any other sum greater than $580.00.

4th. The evidence showed that the rental value of the land in controversy did not exceed $180.00 per year, and that for the whole period alleged in the complaint during which the defendants have withheld the same, the rental value of said land was $1080.00, and that during the period during which defendants have been in possession of said land before
191 the commencement of this action, the said defendants erected on said land permanent improvements consisting of a house and fencing of the value of $500.00, and that said defendants were at the time of the erection holding said lands under color of title adversely to the claim of the plaintiff in good faith, and the verdict of the jury for the sum of two thousand dollars damages was contrary to this evidence and unsupported by any evidence of damage in a greater sum than $580.

SPECIFICATIONS AS TO EXCEPTIONS.

The defendants hereby specify the following particular exceptions upon which they will rely on their motion for a new trial herein and on their appeal from the judgment therein, to-wit:

1st. Upon their exception to that portion of the instructions of the Court in which the Court instructed the jury that on the 1st day of February, 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto, the owner of and in the possession of and entitled to the possession of and from thence hitherto has been the owner of and entitled to the possession of the land described in the plaintiff's complaint and also described in said instructions.

2nd. Upon their exception to that portion of the instructions of the Court in which the Court instructed the jury that on the 1st day of February, 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same and ousted and ejected the plaintiff from the same, excepting the portions described as "A" and "B" in the said instructions and in the answer and ever since wrongfully withheld and still withholds the possession thereof from the plaintiff.

3rd. Upon their exception to that portion of the instructions of the Court in which the Court instructed the jury that, the above being the conclusions of the Court on the
192 issues submitted to it for determination, the Court hereby instructs the jury that their verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of all the land in controversy, i. e., all of the 46.26-100 acre tract described in the complaint save and except the two parcels thereof which are now in plaintiff's possession.

HEPBURN WILKINS,
Attorney for Defendants.

And because the matters aforesaid do not appear by the record of said cause, the Hon. F. M. Angellotti, the Judge of said Court before whom said cause was tried, hath hereto set his hand at the request of the defendants herein this 15th day of July, 1897, in testimony that the foregoing Bill of Exceptions is a true Bill of Exceptions on the defendants' motion

for a new trial and an appeal from the judgment herein and the said Bill of Exceptions is hereby settled and allowed.

F. M. ANGELLOTTI,
Judge.

Filed July 15, 1897.

THOS. S. BONNEAU,
Clerk.

[Title of Court and Cause.]

ORDER DENYING MOTION FOR A NEW TRIAL AND GRANTING A NEW TRIAL AS TO DAMAGES UNLESS $400.00 BE REMITTED.

In Open Court, July 26th, 1897.

The action of the defendants to set aside and vacate the decision of the Court, the verdict of the jury and the judgment hereintofore entered herein, and to grant a new trial of said action, came on regularly for hearing on the 26th day of July, 1897, and after hearing H. Wilkins, Esq., defendants' attorney, in favor of said motion, and Messrs. E. B. Mahon and L. D. McKisick in opposition thereto,

193 It is Ordered that said motion be, and the same is, hereby denied as to the decision, verdict and judgment herein, except as to the amount of damages awarded to plaintiff in the verdict and judgment herein, and that if within twenty days from the entry of this Order, the plaintiff does not file herein a written consent that the judgment as to damages in favor of plaintiff be for the sum of sixteen hundred dollars and costs instead of two thousand dollars and costs, then that a new trial be granted, but only as to the issue as to the amount of damages to which plaintiff is entitled for the withholding of the possession of the land in controversy.

And if within twenty days such consent on behalf of plaintiff is filed, then that the motion for a new trial be denied as to all and singular of the issues in this cause, and that said decision, verdict and judgment stand in all respects as made, filed and entered herein, except that the judgment as to damages shall be in favor of plaintiff for sixteen hundred dollars and costs in lieu of two thousand dollars and costs, and that execution of the judgment herein be stayed for twenty days from this date.

Plaintiff on the 31st day of July, 1897, consented to the modification of the judgment as provided by the last foregoing

order and on the same day the Court made and entered an order modifying said judgment accordingly.

[Title of Court and Cause.]

ORDER DENYING MOTION FOR A NEW TRIAL.

July 31st, A. D. 1897.

Present, Hon. F. M. Angellotti, Judge.

The plaintiff, in compliance with the order heretofore, to-wit, on the 26th day of July, 1897, made and entered herein, having filed his written consent that the judgment in favor of plaintiff, as to the damages for withholding the premises in controversy, be for the sum of Sixteen Hundred Dollars and costs, instead of Two Thousand Dollars and costs.

194 It is ordered that the defendants' motion for a new trial of this action be, and the same is, hereby denied, as to all and singular the issues in this cause.

[Title of Court and Cause.]

NOTICE OF APPEAL.

To E. B. Mahon, Esq.,
L. D. McKisick, Esq., and the
Clerk of the above entitled Court.

You will please take notice that the defendants in the above entitled action hereby appeal to the Supreme Court of the State of California, from the judgment in said action, dated the 21st day of April, 1897, and entered April 22nd, 1897, in favor of the plaintiff and against the defendants in said action, and from the whole and every part of said judgment, also from the order made and entered in said action on the 26th day of July, 1897, denying the defendants' motion for a new trial and from the whole of said order except that portion thereof granting a new trial as to the issues as to the amount of damages unless the plaintiff file a consent that the judgment be reduced to $1600.00, also from the order made and entered in said action on the 31st day of July, 1897, denying the defendants' motion for a new trial and from the whole of said order.

Dated August 13th, 1897.

HEPBURN WILKINS,
Attorney for Defendants.

CERTIFICATE.

We hereby certify that the foregoing are true and correct copies of papers on file in the above entitled action and the proceedings of record in said action, and that the same constitutes the Transcript on Appeal of the Defendants therein from the judgment and the order denying the defend-
195 ants' motion for a new trial therein.

And we further certify that an undertaking on said appeal in due form has been properly filed in said action.

Note the changes made in said transcript opposite the initials E. B. M. made before signing.

HEPBURN WILKINS,
Attorney for Defendants and Appellants.
E. B. MAHON and L. D. McKISICK,
Attorneys for Plaintiff and Respondent.

Dated Sept. 21st, 1897.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Ebenezer Wormouth,
Plaintiff,

vs.

Peter Gardner and Jacob Gardner,
Defendants.

DEFENDANTS' TRANSCRIPT ON APPEAL.

Filed September , 1897.

T. H. WARD,
Clerk.

By
Deputy Clerk.

OPINION AND JUDGMENT.

Filed July 6, 1899.

SUPREME COURT OF THE STATE OF CALIFORNIA, DEPARTMENT TWO.

Ebenezer Wormouth,
Plaintiff and Respondent,
v.
Peter Gardner and Jacob Gardner,
Defendants and Appellants.

S. F. No. 1143.

This is an action in ejectment to recover possession of certain lands described in the complaint. Judgment be-
196 low went for plaintiff, and defendants appeal from the judgment and from the order denying a motion for a new trial.

Plaintiff claims title under a homestead entry made in accordance with the United States laws upon that subject (see Wormouth v. Gardner, 105 Cal. 149), and before the filing of the cross-complaint hereinafter mentioned he received a United States patent for the lands in pursuance of his homestead entry. The principal contention of defendants for a reversal is in relation to what they call their equitable title. This title, as shown in the cross-complaint, is briefly as follows: It is averred that the land in contest here was within the exterior boundaries of a certain Mexican grant, made in 1835, to Juan Reed, of a certain tract of land called the Rancho Corte de Madera del Presidio—usually called the Reed Rancho; that this grant was presented to the Land Commissioners and the United States District Court, and was confirmed; that a United States patent to the rancho was issued to the heirs of Reed in February, 1885, and that the patent excluded the land in contest in this case, and that the Reed heirs supposed the land was included within said grant, and with that understanding conveyed the same to various parties, through whom, by mesne conveyances, whatever right they had to this piece of land became vested in the defendant Jacob Gardner, whose immediate grantor was one Throckmorton. It is further averred, that in January, 1875, the said Throckmorton made application to the United States Land Department to purchase said land, under the Act of Congress, entitled "An Act to quiet titles in California," approved July 23,

1866, basing his application upon the facts hereinbefore stated, and that the plaintiff herein, Wormouth, was made a party defendant in said application, and that a contest took place in the Land Department between Throckmorton, upon his claim as aforesaid, and Wormouth as a homestead claimant; that the Register and Receiver of the United States Land Office at San Francisco, in which application was made, decided the case in favor of Wormouth, and against Throckmorton; that
197 Throckmorton appealed to the Commissioner of the General Land Office, who also decided the case against him; and that he then appealed to the Secretary of the Interior, who again decided the case against him and in favor of Wormouth; but that each of said officers decided the case upon an erroneous proposition of law; and that therefore it ought to be decreed that the plaintiff holds said land in trust for defendant Jacob Gardner, and should convey the same to the latter. A demurrer to this cross-complaint was sustained by the court below, but upon appeal this Court held that the averments of the complaint were sufficient on their face to show that the decision of the land department had been based upon an erroneous construction of the law, and reversed the case, with directions to the Court below to overrule the demurrer—the Court declaring, however, in its opinion, very clearly, the principles upon which it should be determined whether or not the decision of the Land Department was final. See Wormouth v. Gardner, 112 Cal. 506. After the remittitur went down, the plaintiff filed an answer in which all the material averments of the cross-complaint were denied. Upon the trial the defendants introduced all the proceedings had in the Land Department in the said contest of Throckmorton and Wormouth. That contest was one entirely within the jurisdiction of the United States Land Department, that is, each party was endeavoring to get title to what each admitted to be United States government land, which was subject to disposition under the laws of the United States. The Land Department, therefore, had exclusive jurisdiction to determine all facts which arose in the contest; and in order to successfully attack the decision of the department the defendant in this present case would have to show that such decision was founded upon an erroneous notion of the law. But this he has failed to do. The department, among other things, found that the land in contest never was within the boundaries of the grant to Reed; that it was never regarded as being included in that grant, and that Throckmorton, at the time he claimed to

have purchased from the Reed heirs, either knew or had
198 good reason to believe that the land was not included in the grant, and was not a bona fide purchaser within the meaning of the Act of July 23, 1866. In Wormouth v. Gardner, 112 Cal. 506, this Court said: "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the actual possession of the same, according to the lines of his purchase, were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as his belief that the land he purchased was included within the original limits of the Mexican grant were also facts to be determined by that officer from all the circumstances under which the purchase was made. Whether that officer properly considered the weight to which the evidence before him was entitled, or whether he drew correct conclusions from that evidence, his determination with reference to these facts, whether correct or erroneous, is conclusive upon the judicial tribunals. These tribunals cannot exercise a revisory jurisdiction over him in matters which are within the scope of the authority conferred upon him, but if, upon the undisputed facts, he made an erroneous application of the law pertinent to these facts, his action is open to review." In the case at bar it nowhere appears that the Secretary of the Interior made an erroneous "application of the law," but it does appear that his decision was based upon facts which necessarily defeated the claim of Throckmorton. For the same reasons the decision of the United States land department was conclusive as to Wormouth's title as a homestead claimant.

What appellant claims as his legal title was presented to the jury in the shape of an issue as to damages for detention of the land. The jury found a verdict of two thousand dollars, which the court reduced to sixteen hundred dollars. The United States patent to the Reed heirs was finally determinative of the boundaries of the grant; and we see no other point in the case necessary to be discussed.

The judgment and order appealed from are af-
199 firmed.

McFARLAND, J.

We concur:
TEMPLE, J.,
GAROUTTE, J.

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR, WITH SUPERSEDEAS.

To the Honorable William H. Beatty, Chief Justice of the Supreme Court of the State of California:

Come now Jacob Gardner and Peter Gardner, the defendants and appellants in said Supreme Court of the State of California, and as plaintiffs in error herein, and petition that you, the Honorable Chief Justice of said Supreme Court, allow a writ of error, directed to the Supreme Court of the State of California, to be taken to the Supreme Court of the United States, from the final decision and judgment of said Supreme Court of the State of California, rendered in the above-entitled cause, wherein Ebenezer Wormouth was the respondent and the said Jacob Gardner and Peter Gardner were the appellants, the same being numbered in the records of said Supreme Court of said State of California as "San Francisco No. 1143," upon the ground that in said decision and final judgment of said Supreme Court of the State of California there is drawn in question certain title and right of the said Jacob Gardner and Peter Gardner claimed under the Constitution of the United States, and claimed under the Treaty of Guadalupe Hidalgo, a treaty of the United States with the Republic of Mexico, and under the laws of the United States, the same being specified and particularized in an assignment of errors in that behalf, to be filed in said Supreme Court of the State of California, and in the Supreme Court of the United States, upon said writ of error, a copy of which assignment of errors is hereunto attached, referred to and made part hereof, and to be filed herewith, and because the said decision and said final judgment of said Supreme Court of the State of California was against the said title and right of the said Jacob Gardner and Peter Gardner, claimed under said Constitution and under said treaty, and under the said laws of the United States, in order that said decision and said final judgment of said Supreme Court of the State of California may be re-examined and reversed in said Supreme Court of the United States, agreeable to the provisions of section 709 of the Revised Statutes of the United States.

And, further, that an order be made fixing the amount of security which the said Jacob Gardner and Peter Gardner,

said appellants, as said plaintiffs in error, shall give and furnish upon said writ of error, and that upon the giving of such security that all proceedings in said Supreme Court of the State of California, in the Superior Court of said State of California, in and for the County of Marin, be suspended and stayed until after the final determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray.

GEORGE W. MONTEITH.

Attorney for Jacob Gardner and Peter Gardner, said Appellants and said Plaintiffs in Error.

[Endorsed:] Filed Aug. 8, 1899.

GEO. W. ROOT, Clerk.
By A. W. Johnson, Deputy.

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR WITH SUPERSEDEAS.

Upon the annexed petition of Jacob Gardner and Peter Gardner, the appellants therein mentioned, and as plaintiffs in error as therein mentioned, through George W. Monteith, Esq., their attorney, and upon the filing of the petition for a writ of error and assignment of errors, it is hereby ordered that a writ of error be and is hereby allowed to have reexamined and reviewed in the Supreme Court of the United States, the decision and final judgment heretofore entered in the Supreme Court of the State of California in said cause herein, the said Jacob Gardner and Peter Gardner are the appellants and the said Ebenezer Wormouth is the respondent, the said cause being numbered in the records of the Supreme Court of the State of California, "San Francisco, No. 1143."

And it is further ordered that the amount of the bond upon said writ of error, and for the purpose of having suspended and stayed all further proceedings in said Supreme Court of the State of California and in the Superior Court of the State of California, in and for the County of Marin, upon or in pursuance of said decision and the said final judgment of the Supreme Court of the State of California, until the determination of said writ of error by the Supreme Court of the United States, is hereby fixed at twenty-five hundred ($2500) dollars.

And it is ordered that upon the giving by the said Jacob Gardner and Peter Gardner, said appellants as said plaintiffs

in error, of said bond in said sum of twenty-five hundred ($2500) dollars, and when approved by the Chief Justice
200 of the Supreme Court of the State of California, the Justice allowing the issuance of said writ of error, that all further proceedings in said Supreme Court of the State of California and in said Superior Court, be stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated August 8, 1899.

[Signed.] W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

And now, to-wit: on this the seventh day of August, A. D. 1899, Jacob Gardner and Peter Gardner, the above-named plaintiffs in error, come by George W. Monteith, Esq., their attorney, and say: That in the record and proceedings of the above-entitled matter, there is manifest error in this, to-wit:

I.

The said Supreme Court of the State of California erred in affirming the judgment of the Superior Court of said State, in and for the County of Marin therein, in the following particulars, to-wit:

(a) In holding and deciding that the finding of said Superior Court upon the evidence before it, to-wit:

"1st. That on the first day of February, A. D. 1891, plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto, had been the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit": (particularly describing the land that was the subject matter of the cause of action then pending between the parties hereto in said Superior Court);
201 was sustained by the evidence in the case.

(b) In not holding and deciding that the said plaintiff therein, Ebenezer Wormouth, was not the owner of the land in controversy, or any part thereof, in that the evidence in said case did show without any material or substantial con-

flict whatever that the defendant therein, Jacob Gardner, was, on the first day of February, A. D. 1891, the owner of said premises then in the possession thereof, and then entitled to the possession thereof, and from thence hitherto had been the owner, and entitled to the possession thereof, and that his ownership and title to said premises was, by reason of his being through mesne conveyances there in evidence, the successor in interest of John J. Reed, Hilarita M. Reed, and Inez Reed Deffebach, who, at the time of the acquisition of California from the Mexican government, were the Mexican owners of the premises and under the Treaty of Guadalupe Hidalgo entitled to remain in possession thereof at that time (their right thereto having been confirmed by the United States District Court for the Northern District of California, in a proper proceeding concerning the same, under the Act of Congress of March 23, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California."

(c) In holding and deciding that the finding of said Superior Court, to-wit:

"That on said first day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without any right and title, wrongfully and unlawfully entered into and upon the same and ousted and ejected plaintiff from the same" excepting certain specific portions), was sustained by the evidence in said case.

(d) In not holding and deciding that upon the first day of February, A. D. 1891, the said defendant, Jacob Gardner, was lawfully in the possession of said land and premises under a title, right and possession acquired by him through mesne conveyances from Juan Reed, who, in 1835, had obtained a valid title to said premises from the Mexican government,
202 and whose heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, at the time the Treaty of Guadalupe Hidalgo was made, were in possession of and who were entitled thereto under said treaty, and who from the time of said treaty, by themselves and by their successors, including said Jacob Gardner, had been in lawful, continuous, actual and adverse possession of said premises from the month of November, 1835, down to and including said first day of February, A. D. 1891.

(e) In not holding and deciding that the evidence before said Superior Court, as contained in the record upon the appeal therefrom to said Supreme Court of said State of Cali-

fornia, did show, without any material or substantial conflict, that Jacob Gardner was the owner of said premises, in the possession thereof, and entitled to a possession thereof, under a valid and vested right and title thereto, under the constitution and laws of the United States, and under the Treaty of Guadalupe Hidalgo, and as the lawful successor in interest of the said John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, to whom the same had been decreed by the United States District Court in and for the Northern District of California.

II.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that under the Constitution and laws of the United States the right and title claimed by the said plaintiff Wormouth to the premises was invalid, and was based upon and under a pretended homestead entry that had been made by the said Wormouth in the United States Land Office at San Francisco, California, and that was predicated upon a forcible entry of the said Wormouth into a portion of the premises in controversy, at a time when the predecessors in interest of the said Jacob Gardner were in lawful, actual, exclusive and adverse possession thereof, and at
202 a time when the United States was not in possession of any portion thereof.

III.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the title claimed by said plaintiff Wormouth was one based wholly upon and under the laws of the United States, with reference to the disposition and sale of the public lands of the United States by the United States Land Department, and was one wherein the officers of said Land Department had assumed to convey to the said Wormouth the premises in controversy, which the evidence in the record before said Supreme Court did show, without any material or substantial conflict, never was a part of, and never had been a part of or included within the public lands of the United States, and to which the United States

never had any lawful right, title or interest in, or claim to, and which the officers of the United States in the Land Office at San Francisco, California, and in the Land Department of the United States, never had or had had any jurisdiction of or control over, under the laws and Constitution of the United States, but which for many years prior to, and at the time of the acquisition of California by the United States, under said treaty, were and ever since have been private lands, and held and owned by the predecessors in interest of said Jacob Gardner, whose title thereto accrued long before the making of said Treaty of Guadalupe Hidalgo, between the United States and the Republic of Mexico, and which right and title was recognized by and vested in them by said treaty, and by them, through mesne conveyances, transmitted to said Jacob Gardner.

IV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in
204 not reversing the same, upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that the rights claimed by both parties to the premises in controversy were dependent wholly upon, and were under the Constitution, treaties and laws of the United States, and that under the Constitution, treaties and laws of the United States, the title, ownership and right of possession claimed by the said Wormouth were invalid and wholly void.

V.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that as it appeared in the evidence contained in the record before said Supreme Court, without any material or substantial conflict, that the entire claim of the said plaintiff, Wormouth, to the premises was as a homestead claim under the laws of the United States; at the time the proceeding was instituted he had not acquired any title from the United States to the premises.

VI.

That the Supreme Court of the State of California erred in

affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the original homestead entry under which the said plaintiff, Wormouth, claimed title to the premises in controversy was void, in that it appeared that at the time said entry was made S. R. Throckmorton, the predecessor in interest of the said Jacob Gardner, was in actual, exclusive and adverse possession of the premises, claiming under a right and title vested in him by virtue of said treaty, against that of the United States, and by reason of which, under the laws, treaties and Constitution of the United States said homestead entry, and all subsequent proceedings in the Land Department based thereon, were
205 absolutely void.

VII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that all questions of title to, possession, or ownership of the premises in controversy, of both parties, were upon and under the Constitution, treaties and laws of the United States, under which it appeared in the record before said Supreme Court, without any material or substantial conflict, that the title claimed by the said plaintiff, Wormouth, was wholly void, and that the title claimed by the said defendant, Jacob Gardner, was thereunder valid and well vested.

VIII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of said Superior Court, to-wit:

"1st. That on the first day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises" (describing the premises described in the complaint in said action in said Superior Court), was under the Constitution, treaties and laws of the United States wholly contrary to and unsustained by the evidence in said case appearing in the record on appeal before said Supreme Court.

IX.

That the Supreme Court of the State of California erred in

affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of
206 the Superior Court, to-wit:

"2nd. That on said first day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possesson of said lands and premises the defendants, without right or title, wrongfully and unlawfully entered into and upon the same," and ousted and ejected plaintiff from the same (excepting a certain portion thereof therein described), was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence.

X.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the instruction of said Superior Court to the jury upon the trial in said Superior Court, whereby said jury was instructed that its verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence in that the evidence without any material or substantial conflict showed an absolute right and title thereto in said Jacob Gardner, under said treaty and the Constitution and laws of the United States.

XI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the finding of said Superior Court, and the verdict of the jury therein, upon which said judgment was based, were under the Constitution, treaties and laws of the United States wholly unsupported and unsustained by the evidence, and were contrary to the same adduced upon the trial in said Superior Court, it appearing in the record on appeal before said Supreme Court, without any material or substantial conflict, that said Jacob Gard-
207 ner held abosolute right and title thereto, under the provisons of said treaty and the laws of the United States relating thereto.

XII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the evidence before said Superior Court appearing in the record on appeal before said Supreme Court, did show, without any material or substantial conflict, that the lands in controversy lay east of the western boundary of the Rancho Corte Madera del Presidio, and were included therein, accordingly as the same were possessed by Juan Reed from November, 1835, and by him down to the time of his death, by his heirs after his death, and by their successors in interest, down to and including the said defendant therein, Jacob Gardner, secured by said treaty and the Constitution and laws of the United States.

XIII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence before said Superior Court, without any material or substantial conflict, that the premises in controversy were included within the boundaries of the Rancho Corte Madera del Presidio, accordingly as the same were secured by said treaty and confirmed to the heirs of Juan Reed by the final decree of the United States District Court of the Northern District of California, of January 14, 1856, and because that the title and interest of the said heirs of the said Reed to the premises in controversy had become vested in said defendant, Jacob Gardner, through mesne conveyances from their successors in interest.

XIV.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not re-
208 versing the same, upon the ground that it appeared in the evidence before said Superior Court that under the laws of the United States, under which the said plaintiff, Ebenezer Wormouth, claimed title to said premises, he had acquired no title to ownership in or right of possession to the premises in controversy, or any part thereof, and that he was not entitled to maintain the action in said Superior Court, as against the defendant, Jacob Gardner, or any other person, in

that his original homestead entry and all proceedings based thereon, were void, under the laws and Constitution of the United States.

XV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, and in not ordering the same dismissed or abated upon the ground that in the record on appeal from said Superior Court before said Supreme Court, it was shown conclusively said Superior Court was without jurisdiction to adjudicate any of the issues involved in said cause of action in that the jurisdiction to determine said controversy lay wholly within the Courts of the United States, under the said Act of Congress of March 3, 1851.

XVI.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the whole controversy in said Superior Court turned upon the location of the boundaries of the Rancho Corte Madera del Presidio, which, under the Constitution and laws of the United States, and being based upon a right under a treaty of the United States, and under its Constitution and laws, could only be determined by the Courts of the United States, which had exclusive jurisdiction to determine the same.

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XVII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that said Superior Court was without jurisdiction to determine the subject matter of the controversy involved in said cause of action before it, the same being vested exclusively in the United States District Court for the Northern District of California, by said act of March 3, 1851.

XVIII.

The said Supreme Court of the State of California erred in

affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the controversy before the Superior Court involved the right, title, ownership and possession of the premises there in controversy, which right, title, ownership and possession being dependent wholly upon a treaty of the United States, to-wit: the Treaty of Guadalupe Hidalgo, was by the Constitution and laws of the United States, and particularly by the Act of Congress of March 3, 1851, hereinbefore referred to, exclusively cognizable and determinable in the District Court of the United States of the Northern District of California, and the Supreme Court of the United States, and in that the question of the right, title, ownership and possession there involved had been finally adjudicated and settled in said District Court by a final decree of said District Court, confirming the right and title of the heirs of Juan Reed to the land in controversy (together with other lands), and the right and title thereto being a right and title under said treaty, was drawn in issue in Superior Court, which Superior Court found erroneously adversely thereto, and basing its judgment upon such finding, erroneously rendered judgment against the said defendant, Jacob Gardner, and which judgment was affirmed by said Supreme Court, notwithstanding that said right and said title under said
210 treaty was there fully presented and argued, and the decision of said Supreme Court of the State of California was thereby against said right and said title, under said treaty claimed by the said defendant, Jacob Gardner, as the successor in interest of the said heirs of Juan Reed, the confirmees under said decree of said District Court, and thereby denied the said defendant, Jacob Gardner's, right and title under said treaty to said premises.

XIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed title to the premises in controversy, under the treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who became then possessed thereof and was possessed thereof from that time until his

death in 1843, at which time his title and possession of said premises descended and became vested in and were possessed by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who as his heirs, and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California in a decree which became final and filed in said District Court January 14, 1856; the title of said heirs of said Juan Reed thereto, through mesne conveyances upon the 17th day of July, 1890, having
211 been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid title claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said title claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and because the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same; and because, by reason of said decision of said Supreme Court of the State of California affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his title to said premises duly claimed by him and duly vested in him by reason of

said Treaty of Guadalupe Hidalgo and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in
212 not reversing the same, upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed right and title to the premises in controversy, under the Treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who then became possessed thereof, and was possessed thereof from that time until his death in 1843, at which time his right and possession of said premises descended and became vested in and were possessed by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who, as his heirs and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California, and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid, were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California, in a decree which became final, and filed in said District Court, January 14, 1856; the right of said heirs of said Juan Reed thereto, through mesne conveyances, upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob

Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained
213 by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid right claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said right claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and before the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same. And because, by reason of said decision of said Supreme Court of the State of California, affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his right to said premises duly claimed by him and duly vested in him, by reason of said Treaty of Guadalupe Hidalgo, and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said title of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said right of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the
214 United States, to the premises in controversy.

XXIII.

That said Supreme Court of the State of California erred in

not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was beyond its jurisdiction in that it in effect reviewed and set aside the said decree of said United States District Court of January 14, 1856, so far as the same confirmed the right and title of said Jacob Gardner and his predecessors to said premises.

XXIV.

That said Supreme Court of the State of California erred in not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was against the right and title of said Jacob Gardner to said premises as secured to his predecessors by said Treaty of Guadalupe Hidalgo.

XXV.

That said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, and in not reversing the same, upon the ground that the title, ownership and possession of the premises there in controversy, and the question of title thereto, had been finally adjudicated in the District Court of the United States for the Northern District of California, in its aforesaid decree of January 14, 1856, and upon the further ground of said Superior Court was without power, authority or jurisdiction to change, alter or review the lawful effect of said decree, and was without jurisdiction to settle any right of the parties thereto, or their successors in interest, including said defendant, Jacob Gardner, finally determined or settled or adjudicated thereby.

XXVI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in
215 not reversing the same, on the ground that the title and the right was one insured and guaranteed to the said heirs of said Juan Reed, and to their successors in interest, including said defendant, Jacob Gardner, under said Act of Congress of March 3, 1851, to the premises in controversy.

XXVII.

That said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, upon the ground that the said Superior Court, by its said judgment, had in excess of its authority and jurisdiction decided against and held invalid the right and title of the Reed heirs to the premises in controversy, under the Treaty of Guadalupe Hidalgo, and which was confirmed to them and finally adjudicated valid by the United States District Court, by its said final decree of January 14, 1856, and to which right and title said Jacob Gardner had succeeded, as shown by certain mesne conveyances from said Reed heirs and their successors in interest, mentioned in the pleadings, and proved by the evidence at said trial, without any conflict whatever.

XXVIII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the sole question of right and title to the premises in controversy, before said Superior Court, was upon the validity of the right and title to said premises claimed by said Jacob Gardner, whose claim was that, as the successor in interest of said Reed heirs, the Mexicans who owned and possessed said premises at the time said treaty was executed and went into effect, his right and title to said premises which was secured to said Reed heirs by said treaty, and of the Constitution and laws of the United States relating thereto, and which had been confirmed to them by said United States District Court of the North-
216 ern District of California by its said decree of January 14, 1856, and that his ownership of said premises was the same ownership as their ownership and as their lawful successor in interest thereto, and that their possession beginning with that of their ancestor, Juan Reed, in November, 1835, had continued uninterruptedly through them and their several successors in interest down to and including the said Jacob Gardner, at the time of the commencement of said action, and ever since, and that his said right and title to said premises was the only issue before said Superior Court, upon which it based the following findings, to-wit:

1st. That on the 1st day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was and for a long time prior thereto

had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning, being lot 3 of Section 28, and lot 3 of Section 29, township 1 north, of Range No. 6 west, M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining." And that the judgment of said Superior Court, being based upon that finding and decision against said title and right claimed under said treaty by the said Gardner, was contrary to the provisions of the Constitution, treaties and laws of the United States relating thereto, and operated to destroy, set aside and annul a valid and vested right and title
217 belonging to the said Gardner under the provisions of said treaty, and the Constitution and laws of the United States.

XXIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that there was no evidence before said Superior Court upon which there was raised any material or substantial issue of fact upon any point or question involved in said claim of right and title of said Jacob Gardner, under said treaty, and there was nothing to sustain said finding set out in the preceding assignment of error number XXVIII, and that said finding of said Superior Court was found by said Superior Court solely because it appeared that the said Land Department had issued a patent to said Reed heirs after they had parted with their title and possession to the premises in controversy to certain of their successors in estate, who were the predecessors in estate of the said Jacob

Gardner, and which patent fixed the boundaries of said Rancho Corte Madera del Presidio upon different lines from those established by said decree of said United States District Court, of January 14, 1856, in this, to-wit: the said decree of said United States District Court adjudged said boundaries to be the same as laid down in the original grant of said rancho to said Juan Reed in 1835, and which grant of possession fixed the western boundary of said rancho upon a line that ran west of the premises in controversy, and which began as therein specified at the "solar" or house lot of the said Juan Reed, and thence ran north to the waters of the Arroyo Holon, and that the northern boundary of said rancho, beginning where said western boundary ended at a forest of redwoods in said Arroyo Holon, continued eastwardly along the waters of said Arroyo Holon, and that said western and northern boundaries as laid down and fixed in said grant of possession to said Juan Reed which was confirmed by and which became a part
218 of said decree of said District Court, included the premises in controversy within the boundaries of said rancho, and the said ranch according to said boundaries, and after his death, as aforesaid, his said heirs went into possession thereof, and continued in actual possession thereof until they conveyed the same to the predecessors of said Jacob Gardner, as alleged in the cross-complaint of Jacob Gardner in said Superior Court.

That according to said grant of possession to said Juan Reed, confirmed by said District Court, as aforesaid, the said western boundary beginning at said "solar" as aforesaid, went thence west of north accordingly as exemplified therein, and particularly in the map attached to said grant of possession.

That said patent issued by said Land Department to said Reed heirs was issued upon the 25th day of February, 1885, and the boundaries of said grant, according to said patent, did not commence at said "solar" or house lot, but, on the contrary, commenced at another point about three-quarters of a mile therefrom, and which point was pretended to be said "solar," and they ran said boundary from said pretended "solar" thence south to the Arroyo Corte Madera del Presidio, upon an entirely different line from that fixed and specified by said decree of said District Court, to-wit: said boundaries as laid down in said grant of possession to said Juan Reed; that the western boundary of said rancho, according to said patent, ended at said pretended "solar," and ran east of the premises in controversy, and wholly excluded from the north-

ern boundary of said rancho the waters of said Arroyo Holon; that said western boundary, according to said patent, beginning at its southernmost point, ran east of north, as against that of said grant of possession, which ran west of north; that said map was based upon a map compiled in said Land Office, and which map was not made lawfully upon a survey under the laws of the United States; that in the evidence in said Superior Court, it was proved, without any material or substantial conflict, that said "solar" was located where said defendant, Jacob Gardner, claimed the same was located, and where the decree of said District Court located it, and
219 said evidence also proved, without any conflict whatever, that the western boundary of said rancho lay west of the premises in controversy and not east of them; that there was no evidence in said record to in any wise sustain, or that even tended to show that the western boundary line contained in said patent conformed in any respect to said decree of said District Court, but on the contrary said evidence, without any material and susbstantial conflict whatever, showed that said western boundary lay west of said premises, and not east thereof, and that the line as delineated and laid down in said patent in no wise followed the decree of said District Court, but on the contrary said patent specified that the boundaries of said grant commencing at the "solar" went south to the Arroyo Corte Madera del Presidio, wholly contrary to said decree, and in violation of its express mandate, but was made solely by said Land Department, and was made without authority of law.

That the whole basis upon which said finding of said Superior Court was based was the mere fact that said Land Department, in compiling its map and survey, and in issuing its patent, had thereby excluded the premises in controversy from said rancho, contrary to said decree of said United States District Court, and notwithstanding that no court of competent jurisdiction had ever decreed otherwise than said District Court, and that the said Jacob Gardner and his predecessors in estate had held actual, continuous and adverse and lawful possession of said premises from the time the same was originally granted to said Juan Reed in November, 1835, as aforesaid, down to the time of the commencement of said action in said Superior Court, and ever since, and notwithstanding that the right and title of the said Jacob Gardner to said premises was a right claimed and held under said Treaty of Guadalupe

Hidalgo, under said decree of said District Court, and under the Constitution and laws of the United States, and which had been finally settled and adjudicated.

XXX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in
220 not reversing the same, upon the ground that the action was prematurely commenced in said Superior Court by said Wormouth, as plaintiff, and in that at the time of the commencement of the same, the said Wormouth's application therefor was pending in the Land Department, the patent had not been issued, and if the United States had title to the premises it had not parted with the same, and said Wormouth, claiming none other than the United States title, had none whatever, and could not therefore maintain said action; as under the laws of the United States the title does not pass or vest in a homestead claimant until the United States patent conveying the title of the Government issues, except in the case of mere naked trespassers who neither have nor make bona fide claim of title.

XXXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the sole question of title decided by said Superior Court was one wherein the original primary sovereign title of the United States was at issue, i. e., the question as to whether the lands in controversy were ever included with the public land of the United States or not; whether they were under the Treaty of Guadalupe Hidalgo public lands of the United States, or the lands of private owners who possessed them at the time of, and prior to the execution of said Treaty under the laws of the Republic of Mexico; and that the settlement of that question was one which, under the Constitution and laws of the United States, particularly under the Act of Congress of March 3, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California," was vested solely in the Courts of the United States, to-wit: The District Court of the Northern District of California, and on appeal therefrom, the Supreme Court of the United States, and because said Superior Court
221 was without jurisdiction to make any determination with reference to the settlement of that question.

XXXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same upon the ground that the question of right and title decided by said Superior Court was one which had been finally settled and determined by said decree of said United States District Court, and which said Superior Court was without power, authority or jurisdiction to in any wise determine.

XXXIII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the following grounds, to-wit:

(a) That the evidence was insufficient to justify the second finding of the Superior Court upon the equitable issues in the case to the effect that one of the questions decided by the United States Commissioner of the General Land Office and by the United States Secretary of the Interior, in the contest of Throckmorton v. Wormouth, mentioned in the 20th paragraph of the cross-complaint in said cause, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed and that there was no evidence to support said finding.

(b) That the evidence was insufficient to justify the third finding of the Superior Court, upon the equitable issues before it, that the officers of the United States Land Department, to-wit: The Register and Receiver, Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact, upon the evidence produced before said Register and Receiver on said contest, was not included in said original grant by the Mexican Government to Juan Reed, and
222 that there was no evidence to support said finding.

(c) That the evidence was insufficient to justify that portion of the fifth finding of the Superior Court, upon the equitable issues before it, in which it is found that the consideration paid by J. Clinton Bolton to the Reed heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, for the United States Register and Receiver, and affirmed by the deed to him in 1865, was not a money consideration and that

the only consideration which passed from said Bolton to said grantors was the agreement by said Bolton mentioned in said fifth finding, and there is no evidence to support said finding;

(d) The evidence was insufficient to justify the sixth finding of the Superior Court, upon the equitable issues before it, to the effect that the officers of the United States Land Department, to-wit: The United States Register and Receiver, the Commissoner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence produced before them in said contest of Throckmorton v. Wormouth, in denying said application of Throckmorton, did not base their decision upon the question of law alone, but did find and decide, as a fact, that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, but on the contrary the evidence showed that said officers of the United States Land Department based their decision in said contest upon the question of law alone, and did not find and decide that the said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, and that there was no evidence to support said finding.

(e) The evidence was insufficient to justify and there was no other evidence to support that portion of seventh finding of the Superior Court, upon the equitable issues before it, wherein it is found that the rancho granted by the Government of California under the Government of Mexico to Juan Reed, did not include within its exterior limits the lands described in the deed from T. B. Deffebach et al. to Julius C. McCeney, of February 14, 1871, or any part thereof except so much as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J.
223 Reed et al., and the evidence is insufficient to justify, and there is no evidence to support that portion of said seventh finding, wherein it is found that the grant mentioned in the first paragraph of said cross-complaint did not include any part of the land in controversy in this action, and that no grant was ever made by the Mexican Government to Juan Reed or his successors in interest included in any part of the land described and granted to the plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

(f) The evidence was insufficient to justify and there was no evidence to support the eighth finding of the Superior Court, upon the equitable issues before it, to the effect that the land described in said deed from T. B. Deffebach et al. to

Julius C. McCeney, or any part thereof, except as in the seventh finding of the Court set forth, was not within the exterior boundaries of said Mexican grant.

(g) That the evidence was insufficient to justify and there was no evidence to support that portion of the ninth finding of the Superior Court to the effect that the consideration mentioned in the ninth finding of the Superior Court upon the equitable issues before it, to the effect that the consideration mentioned in the fifth finding upon said equitable issues, was the only consideration for the deed mentioned in said ninth finding.

(h) That the evidence was insufficient to justify and there was no evidence to support that portion of the tenth finding of the Superior Court in the equitable issues before it, in which it found that neither T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle or H. C. Newhall did, on the first day of February, 1871, or at any other time, own or were entitled to convey to any one any of the land described in the sixteenth paragraph of said cross-complaint, except a small part thereof, which was described in said tenth finding.

(i) That the evidence was insufficient to justify and there was no evidence to support that portion of the eleventh finding of the Superior Court, upon the equitable issues be-
224 fore it, which is to the effect that Julius C. McCeney on the 19th day of January, 1875, or at any other time, was the owner, and was not entitled to convey any of the land mentioned and described in the deed from said McCeney to said Throckmorton, described in said eleventh finding, save and except that portion of said land which lies within the boundary of said Reed patent.

(j) The evidence was insufficient to justify and there was no evidence to support that portion of the twelfth finding of the Superior Court, upon the equitable issues before it, which is to the effect that none of the grantees named in the deed mentioned or referred to in the 18th paragraph of said cross-complaint purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and rights of the plaintiff, as alleged in his complaint in this action, and that neither the said Throckmorton or his executrix ever had any right to use or improve any part of said lot 3 in section 28, or of said lots 2 and 3 in section 29, and that neither said Throckmorton nor his executrix was ever in the actual possession of the same or

any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff; and the evidence is insufficient to justify, and there is no evidence to support that portion of said twelfth finding which is to the effect that said grantees and each of them, and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by the said deeds, or any part or parcel of said lot 3 in section 28 and said lots 2 and 3 in said section 29, were included within said Mexican grant, and that said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lots 2 and 3 in section 29.

(k) The evidence was insufficient to justify and there was no evidence to support that portion of the thirteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that there is no evidence to show
225 that the evidence introduced in the matter of the application and contest mentioned in the 19th paragraph of said cross-complaint did not show without conflict that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true, but, on the contrary, the evidence did show that all of said facts mentioned were true.

And the evidence is insufficient to show and there is no evidence to show that the evidence introduced in the matter of said application and contest did not establish all of said facts or any material fact in favor of said Throckmorton's right to purchase said land by competent, or any, evidence, and that there was conflict in said evidence and that there was evidence on said contest that contradicted said Throckmorton's evidence, and the evidence alleged in said cross-complaint was not true, but, on the contrary, said evidence did establish all of said facts in favor of Throckmorton's right by competent evidence and without conflict, and there was, in fact, no evidence of said contest which contradicted Throckmorton's evidence, and it fully appeared from the evidence that all the evidence, as alleged in said cross-complaint on said contest, was true;

And the evidence is insufficient to show, and there is no evidence to show that the Register and Receiver of the Land Office at San Francisco did not, nor did either of them, on the 9th day of February, 1866, or at any other time, base their or his decision upon the evidence as the same is alleged in said

cross-complaint, or upon evidence without conflict, but, on the contrary, the evidence fully shows that said Register and Receiver did, on the said 9th day of February, 1886, base their and his decision fully and precisely upon the evidence as the same is alleged in said cross-complaint and upon evidence without conflict;

And the evidence is insufficient to show and there is no evidence to show that the Register and Receiver did not, nor did either of them, rest their or his decision upon the proposition,
or upon a proposition of law, that the said Throck-
226 morton was not in law, or under the law, entitled to
purchase the said land, and that the Commissioner of the General Land Office, upon appeal from the decision of the Register and Receiver, upon the, or upon a proposition of law in deciding that Throckmorton was not entitled to purchase the said land, and that the said Secretary of the Interior did not rest his decision affirming the decision of the Commissioner of the General Land Office upon the, or upon a proposition of law, and that the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of Throckmorton v. Wormouth, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint, but, on the contrary, the evidence showed that each of the said officers of the Land Department, to wit: the Register and Receiver, the Commissioner and the Secretary of the Interior, based his decison and each of said respective decisions upon the proposition of law, to-wit: the proposition that upon all the facts set forth in said cross-complaint, which were duly established before said officers, and each of them, the said Throckmorton was not in law, or under the law, entitled to purchase the said land.

(l) The evidence was insufficient to justify and there was no evidence to support that portion of the fourteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns, and was not entitled to purchase the said land or any part thereof under said act of Congress, and that the Register and Receiver of said Land Office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow plaintiff to make proof and payment for the said land, but, on the contrary, the fact was and the proofs before said

officers showed without conflict that said Throckmorton was a bona fide purchaser from Mexican grantees and their assigns, and was entitled to purchase the said land and
227 every part thereof under said act, and the Register and Receiver of said Land Office did, contrary to law, basing their decision on an erroneous construction of the law applicable to the case before them. allow the plaintiff to make proof and payment for said land, and hold in substance that all of the facts set forth in the cross-complaint herein did not entitle said S. R. Throckmorton to purchase said land.

(m) The evidence was insufficient to justify and there was no evidence to support that portion of the fifteenth finding of the Superior Court upon the equitable issues before it, which is to the effect that said Susanna M. Throckmorton was not the owner of the said land when she executed the said deed, and that she was not entitled to convey the same to said Gardner.

(n) The evidence was insufficient to justify, and there was no evidence to support that portion of the sixteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that Jacob Gardner did not, on the 17th day of July, 1890, or at any other time, enter into the possession thereof, except as an intruder and trespasser.

(o) The evidence was insufficient to justify and there was no evidence to support the seventeenth finding of the Superior Court, upon the equitable issues before it, to the effect that said Jacob Gardner is not, and never was, the owner in equity of said land or any part of the land described in the plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22d paragraph of said cross-complaint, and that said plaintiff does not hold said land, or any part thereof, in trust, or otherwise, or at all, for defendant, Jacob Gardner.

XXXIV.

The said Supreme Court of the State of California erred in that part of its decision contained in his opinion filed in said cause upon appeal, in the following particulars:

228 (a) In deciding that "the principal contention of the defendants for reversal was in relation to what they called their equitable title."

(b) In deciding that the contest of Throckmorton referred

to in said opinion was one entirely within the jurisdiction of the United States Land Department, in that the record on appeal before said Supreme Court showed without conflict that the contest was not within the jurisdiction of said Land Department, in that it involved a judicial question as to the character of the land in controversy, whether, under the treaty of Guadalupe Hidalgo, it became public land of the United States or remained the private holding of private owners.

(c) In deciding that both parties in said contest in said Land Department were endeavoring to get title in which each admitted the land was United States Government land, and was subject to disposition under the laws of the United States, it appearing in said record on appeal without conflict that said proceeding on the part of Throckmorton was not to obtain title to what he admitted to be United States Government land, but was for the sole purpose of obtaining a quitclaim of the Government's interest in said land, and thereby removing a cloud upon his title.

(d) In deciding that the Land Department had exclusive jurisdiction to determine all the facts which arose in said contest.

(e) In deciding that the decision of the Land Department in said contest was a decision upon the issues of fact specified in said opinion, in that the transcript of the proceedings in said Land Department in evidence in said Superior Court, and contained in said record upon appeal, did show conclusively that all the evidence before said Land Department was without any conflict as to any material fact; that there were no issues of fact before the Land Department, and that the only decision of the Land Department was upon the legal effect of the undisputed facts in the record before it.

(f) In deciding that "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or
229 whether after his purchase he used and improved and continued in the possession of the same, according to the lines of his purchase, were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as belief that the land he purchased was included within the original limits of the Mexican grant, were also facts to be determined by that officer, from all the circumstances under which the purchase was made." That the decision in these particulars is erroneous and contrary to the Constitution and laws of the United States, in that the evidence before said Land Department

aforesaid, without any material or substantial conflict whatever, did show that at the time Throckmorton made said application to said Land Department, his right and title to said premises was one that was valid and well vested, and secured to him under said Treaty of Guadalupe Hidalgo, and which had been finally settled and adjudicated in favor of the right and title he claimed by said District Court in its said decree of January 14, 1856, and that by reason of the fact that Throckmorton, at the time of said application, had absolute title to said premises, and as a matter of law, under the Constitution and laws of the United States, the question as to whether he purchased the land for a valuable consideration, or that, that after his purchase, he used, improved and continued in the actual possession of the same, or that that of his good faith in making the purchase, or that that of his belief that the land he purchased was included within the original limits of the Mexican grant, could not be raised in said Interior Department, said Interior Department being concluded, as a matter of law, upon all those facts, and that therefore, there being no issues of facts before said Land Department, the Secretary of the Interior could not render a decision upon any of those facts, but could only render a decision upon the law in the case, and that its decision was therefore but a decision upon the law in the case.

(g) In deciding that the decision of the Secretary of the Interior was not an erroneous application of the law,
230 and in deciding that its decision was based upon facts which necessarily defeated the claim of Throckmorton.

(h) In deciding that the decision of the United States Land Department, accordingly as the same in said record and appeal was conclusive in favor of respondent Wormouth's title.

(i) In deciding that the other points in the case were unnecessary to be discussed.

XXXV.

The Supreme Court of the State of California erred in deciding that the decision of the Land Department was conclusive as to Wormouth's title to the premises in controversy, upon the ground that it amounts to the said appellant, Jacob Gardner, being thereby deprived of his property by the State of California, without due process of law, in deciding that the Land Department, by its decision in said contest before it, between said Throckmorton and said Wormouth, that the de-

cision of said Department adverse to said Throckmorton operated to destroy his right and title to said premises under said treaty.

In order that the foregoing assignment of errors may be and appear of record, the respondents present the same to the Court, and pray for such disposition be made thereof as in accordance with the law and statutes of the United States in such cases made and provided.

Wherefore, the said Jacob Gardner and Peter Gardner, as plaintiffs in error, pray that judgment of said Supreme Court of the State of California, be reversed, and that the judgment of said Superior Court of said State of California, in and for said County of Marin, be likewise reversed, and that said Superior Court be directed to grant a new trial of said case.

[Signed.] GEO. W. MONTEITH,
Attorney for Appellants in said Supreme Court
as Plaintiffs in Error.

[Title of Court and Cause.]

BOND.

Know all men by these presents, That we, Jacob Gardner and Peter Gardner, defendants and appellants and plaintiffs in error, as principals, and Casper J. Gardner and Peter Williams, as sureties, all of the County of Marin and State of California, are held and firmly bound unto Ebenezer Wormouth, plaintiff, respondent and defendant in error, in the full and just sum of two thousand five hundred dollars, to be paid to the said Ebenezer Wormouth or his certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at the Supreme Court of the State of California, upon an appeal depending in said Court, taken by the said Jacob Gardner and Peter Gardner, as appellants therein, from a judgment heretofore rendered in the Superior Court of the State of California, in and for the County of Marin,

against said appellants Jacob Gardner and Peter Gardner, as defendants therein, and in favor of the said Ebenezer Wormouth, as the plaintiff therein, a decision and final judgment was rendered against said appellants Jacob Gardner and Peter Gardner, and in favor of said respondent Ebenezer Wormouth, affirming said judgment of said Superior Court, and the said Jacob Gardner and Peter Gardner having obtained a Writ of Error from the Supreme Court of the United States to reverse the aforesaid judgment of said Supreme Court of the State of California in the aforesaid action, and a citation directed to the said Ebenezer Wormouth citing and admonishing him to appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, upon the 6th day of October, 1899.

Now, the condition of the above obligation is such, that if the said Jacob Gardner and Peter Gardner, as plaintiffs in error upon said Writ of Error, shall prosecute said Writ of Error to effect, and shall answer all damages and costs that shall be awarded against them if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JACOB GARDNER. [Seal.]
PETER GARDNER. [Seal.]
CASPER J. GARDNER. [Seal.]
PETER WILLIAMS. [Seal.]

United States of America,
Northern District of California,
City and County of San Francisco—ss.

Casper J. Gardner and Peter Williams, being duly sworn, each for himself, deposes and says that he is a householder in said district, and is worth the sum of two thousand five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Subscribed and sworn to before me, this 8th day of August, A. D. 1899.

CASPER J. GARDNER.
PETER WILLIAMS.

J. S. MANLEY,
Commissioner of U. S. District Court, Northern District of California.

The foregoing bond is hereby approved and ordered filed.

W. H. BEATTY,
Chief Justice of California.

August 8th, 1899.

[Endorsed:] Supreme Court of the State of California. Filed.

GEO. W. ROOT, Clerk.
By A. W. Johnson, Deputy.

[Title of Court and Cause.]

WRIT OF ERROR

United States of America—ss.

The President of the United States to the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California—Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of California, before you, or some of you, being the highest Court of Law or Equity of said State in which the decision could be had in said suit between Jacob Gardner and Peter Gardner, defendants, appellants and plaintiffs in error, and Ebenezer Wormouth, plaintiff, respondent and defendant in error, wherein was drawn in question a title and a right claimed under the Constitution of the United States, and under a treaty of the United States, to wit, the Treaty of Guadalupe Hidalgo, and under the laws of the United States, particularly including an Act of Congress of the United States, entitled "An Act to ascertain and settle the private land claims in the State of California," approved March 3d, 1851, and an Act of Congress entitled "An Act to quiet land titles in California," approved July 23d, 1866, and wherein the decision and the final judgment of the Supreme Court of the State of California were against the right and title set up and claimed under said Constitution, treaty and laws of the United States by the said Jacob Gardner and Peter Gardner, said defendants and appellants therein, that manifest error has happened, to the great damage of the said Jacob Gardner and Peter Gardner, said plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you

send the record and proceedings aforesaid, with all things concerned in the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the seventh day of October next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 8th day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

[L. S.]

[Signed:]

SOUTHARD HOFFMANN,

Clerk of U. S. Circuit Court, Northern District of California.

Allowed by

W. H. BEATTY,

Chief Justice of the Supreme Court of the State of California.